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267

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1924

No. [redacted]101

THE A. B. SMALL COMPANY, PLAINTIFF IN ERROR,

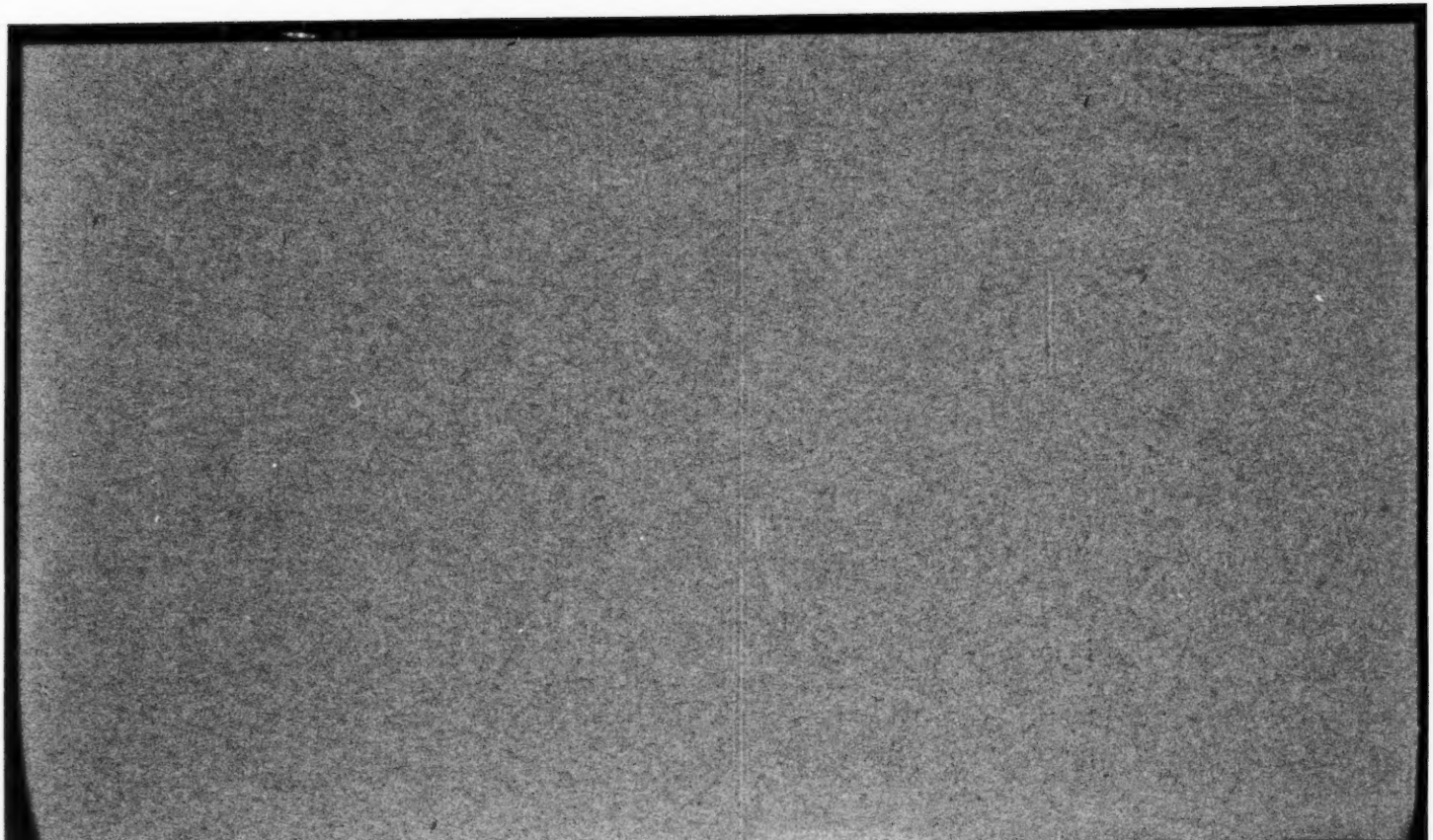
vs.

THE AMERICAN SUGAR REFINING COMPANY

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA

FILED JUNE [redacted], 1925

(29,710)



(29,710)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 400

THE A. B. SMALL COMPANY, PLAINTIFF IN ERROR,

vs.

THE AMERICAN SUGAR REFINING COMPANY

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 26, 1923

[fol. 1] IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE SOUTHERN DISTRICT OF GEORGIA, OCT. TERM, 1921

THE AMERICAN SUGAR REFINING COMPANY

vs.

THE A. B. SMALL COMPANY

PETITION—Filed Aug. 29, 1921

To the Honorable District Court of the United States for the Western Division of the Southern District of Georgia:

The Petition of The American Sugar Refining Company respectfully shows:

Count One

1. Petitioner is a corporation duly organized and existing under the laws of the State of New Jersey, and for the purpose of jurisdiction is a citizen of the State of New Jersey.

2. The A. B. Small Company, hereinafter called the defendant, is a corporation organized and existing under the laws of the State of Georgia having its principal office and place of business in the City of Macon, in the County of Bibb, and in the Western Division of the Southern District of Georgia, and for the purpose of jurisdiction is a citizen of the State of Georgia.

3. This suit is between citizens of different States, and the amount in controversy exclusive of interest and costs exceeds the sum of Three Thousand ($3,000.00) Dollars.

4. At all times hereinafter mentioned, petitioner was and now is engaged in the business of refining sugar and in the business of selling sugar in barrels and bags of various sizes and capacities, a barrel of 350 lbs. being by the custom of the trade the unit of quantity.

[fol. 2] 5. Defendant at all times hereinafter mentioned was and now is a wholesale grocer doing business in the City of Macon and engaged, among other things, in buying and selling refined sugar.

6. On the 14th day of July, 1920, the defendant gave to petitioner a written order, signed by the said defendant for the purchase of eighty-eight (88) twenty-five (25) pound sacks of Domino Granulated Sugar at 23.167¢ per pound; forty-five (45) one hundred (100) pound bags of fine granulated sugar at 22.967¢ per pound; and twelve (12) barrels, in wood, of fine granulated sugar at 22.994¢ per pound; all of said sugar to be delivered during the month of September or as soon thereafter as possible, the defendant agreeing to accept delivery when made by petitioner. By the terms of the order, petitioner was to have the option of making delivery from any of its refineries, and all transportation charges were to be for account of

the defendant. A copy of said order being hereto attached, marked Exhibit "A" and made a part of this petition.

7. On the 22nd day of July 1920 the defendant gave to petitioner an additional written order, signed by the defendant, for fifty (50) twenty-five (25) pound sacks of Domino Granulated Sugar at 23.167¢ per pound; forty-one (41) one hundred (100) pound sacks of fine granulated sugar at 22.967¢ per pound; and twenty-four (24) barrels, in wood, of fine granulated sugar at 22.994¢ per pound; said sugar also to be delivered during the month of September or as soon thereafter as possible, the defendant making the same agreement as to accepting delivery when made by petitioner, and petitioner having the option of making delivery from any of its refineries, all transportation charges to be at the expense of the defendant. A copy of said order being hereto attached, marked Exhibit "B" and made a part of this petition.

8. On or about the 22nd day of July, 1920, petitioner accepted both of the above mentioned orders from the defendant, and sent to the defendant by mail a confirmation of its said acceptance; defendant's said orders and the acceptance of the same constituting written contracts for the delivery of one hundred (100) barrels or [fol. 3] its equivalent of sugar of three hundred and fifty (350) pounds each, to be delivered according to the assortments and at the prices per pound set forth in the written orders of the defendant aforesaid. A copy of petitioner's acceptance of the said two orders being hereto attached, marked Exhibit "C" and made a part of this petition.

9. Under said contracts, the terms of sale were cash less 2% in seven (7) days.

10. Under the terms of the contracts, delivery of the sugar was to be complete on receipt of the same by the carrier.

11. On September 3, 1920, petitioner shipped to the defendant the sugar covered by the two orders in question and mailed to the defendant an invoice covering the shipment, the total amount as shown by the invoice being Eight Thousand and Seventy-four Dollars and Seventy-four Cents ($8,074.74), which was the purchase price of the sugar in accordance with the two orders of the defendant hereinbefore referred to.

12. Thereafter, to-wit: On the 7th day of September, 1920, the defendant notified petitioner by telegram addressed to the New Orleans office of petitioner, that it would reject the shipment of said sugar and confirmed this telegram by letter.

13. Replying to the notification by defendant that it intended to reject the shipment of sugar, petitioner advised the said defendant by letter that it would expect acceptance in accordance with the terms of the contracts, and also on September 9, 1920, informed the defendant that it would permit the defendant to remit for the invoice as if the same had been dated on September 25th, which would make the said invoice payable about October 5th.

14. Upon the arrival of the said sugar at Macon, Georgia, the point of destination, and the refusal of the defendant to accept the same, the said sugar was stored in the warehouse of Outzs, Mitchell & Whaley, at Macon, Georgia, for the account of the said defendant, and defendant was advised of this disposition thereof, and was in- [fol. 4] formed that storage charges would be for his account.

15. The said defendant continuing and persisting in its refusal to accept the sugar, petitioner notified defendant by telegram on November 30, 1920, that the sugar would be re-sold for defendant's account.

16. Defendant made no reply to this notice whatsoever.

17. Thereafter and within a reasonable time from the final rejection of the said shipment of sugar by the defendant, plaintiff resold the same pursuant to the notice to the defendant hereinbefore referred to, from December 15th to December 20th, 1920, at prices ranging from eight and one half (8½¢) per pound less 2% discount to eight (8¢) cents per pound less 2% discount.

18. Petitioner attaches hereto a statement showing in detail the dates upon which said sugar was resold, the amount received therefor, and the persons to whom the same was sold. Said account also shows the demurrage, unloading and storage charges incurred on account of the refusal of the said sugar by the defendant. The amount realized from said resale was the sum of Three Thousand and Sixty Dollars and fourteen cents ($3,060.14); the said statement being marked Exhibit "D" and made a part of this petition.

19. A copy of the said statement showing the amount realized on re-sale was furnished to the said defendant by petitioner.

20. Petitioner demanded of the said defendant the difference between the amount of the contract price of the said sugar and the amount realized upon the re-sale thereof for the account of the defendant, together with the demurrage, unloading and storage charges, the total amount demanded being the sum of Five Thousand One Hundred Eleven Dollars and Seventy Cents ($5,111.70).

21. The said defendant has failed and refused to pay the said sum of Five Thousand One Hundred Eleven Dollars and Seventy Cents ($5,111.70) or any part thereof, and still refuses so to do.

Wherefore, petitioner avers that the said defendant has injured and damaged petitioner in the said sum of Five Thousand One [fol. 5] Hundred Eleven Dollars and Seventy Cents ($5,111.70), together with interest thereon at 7% per annum, and for said sum with interest petitioner prays judgment.

Second Count

1. Petitioner is a corporation duly organized and existing under the laws of the State of New Jersey, and for purposes of jurisdiction is a citizen of the State of New Jersey.

2. The A. B. Small Company, hereinafter called the defendant, is a corporation organized and existing under the laws of the State of Georgia having its principal office and place of business in the City of Macon, in the County of Bibb, and in the Western Division of the Southern District of Georgia, and for the purposes of jurisdiction is a citizen of the State of Georgia.

3. This suit is between citizens of different States and the amount in controversy exclusive of interest and costs exceeds the sum of Three Thousand ($3,000.00) Dollars.

4. At all times hereinafter mentioned, petitioner was and now is engaged in the business of refining sugar and in the business of selling sugar in barrels and bags of various sizes and capacities, a barrel of 350 lbs. being by the custom of the trade the unit of quantity.

5. Defendant at all times hereinafter mentioned was and now is a wholesale grocer doing business in the City of Macon, and engaged, among other things, in buying and selling refined sugar.

6. On the 14th day of July 1920 the defendant gave to petitioner a written order, signed by the said defendant for the purchase of eighty-eight (88) twenty-five (25) pound sacks of Domino Granulated Sugar at 23.167¢ per pound; forty-five (45) one hundred (100) pound bags of fine granulated sugar at 22.967¢ per pound; and twelve (12) barrels, in wood, of fine granulated sugar at 22.994¢ per pound; all of said sugar to be delivered during the month of September or as soon thereafter as possible, the defendant agreeing to accept delivery when made by petitioner. By the terms of the [fol. 6] order, petitioner was to have the option of making delivery from any of its refineries, and all transportation charges were to be for account of the defendant. A copy of said order being hereto attached, marked Exhibit "A" and made a part of this petition.

7. On the 22nd day of July, 1920, the defendant gave to petitioner an additional written order, signed by the defendant, for fifty (50) twenty-five (25) pound sacks of Domino Granulated Sugar at 23.167¢ per pound; forty-one (41) one hundred (100) pound sacks of fine granulated sugar at 22.967¢ per pound; and twenty-four (24) barrels, in wood, of fine granulated sugar at 22.994¢ per pound; said sugar also to be delivered during the month of September or as soon thereafter as possible, the defendant making the same agreement as to accepting delivery when made by petition and petitioner having the option of making delivery from any of its refineries, all transportation charges to be at the expense of the defendant. A copy of said order being hereto attached, marked Exhibit "B" and made a part of this petition.

8. On or about the 22nd day of July 1920, petitioner accepted both of the above mentioned orders from the defendant, and sent to the defendant by mail a confirmation of its said acceptance; defendant's said orders and the acceptance of the same constituting written contracts for the delivery of one hundred (100) barrels or

its equivalent of sugar of three hundred and fifty (350) pounds each, to be delivered according to the assortments and at the prices per pound set forth in the written orders of the defendant aforesaid. A copy of petitioner's acceptance of the said two orders being hereto attached, marked Exhibit "C" and made a part of this petition.

9. Under said contracts, the terms of the sale were cash less 2% in seven (7) days.

10. Under the terms of the contracts, delivery of the sugar was to be complete on receipt of the same by the carrier.

[fol. 7] 11. On September 3, 1920, petitioner shipped to the defendant the sugar covered by the two orders in question and mailed to the defendant an invoice covering the shipment, the total amount as shown by the invoice being Eight Thousand and Seventy-Four and Seventy-four Cents ($8,074.74), which was the purchase price of the sugar in accordance with the two orders of the defendant, hereinbefore referred to.

12. Thereafter, to-wit: On the 7th day of September 1920 the defendant notified petitioner by telegram addressed to the New Orleans office of petitioner, that it would reject the shipment of said sugar, and confirmed this telegram by letter.

13. Replying to the notification by defendant that it intended to reject the shipment of sugar, petitioner advised the said defendant by letter that it would expect acceptance in accordance with the terms of the contracts, and also on September 9, 1920, informed the defendant that it would permit the defendant to remit for the invoice as if the same had been dated on September 25th, which would make the said invoice payable about October 5th.

14. The market price for fine granulated sugar at the time of the final rejection of the shipment by the said defendant was 12.74¢ per pound, and the market value of the one hundred (100) barrels of sugar purchased by defendant and rejected by it at the time and place of delivery was the sum of Forty-four Hundred and Fifty-nine ($4,459.00) Dollars.

15. The difference between the contract price of the sugar purchased by the defendant, to wit: Eight Thousand and Seventy-four Dollars and Seventy-four Cents ($8,074.74), and the market price at the time and place of delivery, to-wit: Forty-four hundred and Fifty-nine ($4,459.00) Dollars, is the sum of Thirty-six Hundred and Fifteen Dollars and Seventy-four cents ($3,615.74).

16. Defendant has injured and damaged petitioner by the refusal to accept and pay for the sugar in accordance with his contract the said sum of Thirty-six hundred and Fifteen Dollars and Seventy-[fol. 8] four cents ($3,615.74), together with interest thereon from date of the rejection of said sugar at the rate of 7% per annum.

17. Defendant is also indebted to petitioner for demurrage on the car of sugar shipped to defendant and rejected by it the sum of

Fourteen Dollars and Seventy Cents ($14.70), and for unloading the same Five ($5.00) Dollars, and for storage charges on the sugar Seventy-seven Dollars and Forty Cents ($77.40), making a total of Ninety-seven Dollars and Ten Cents ($97.10).

Wherefore, petitioner prays judgment against the said defendant for the sum of Thirty-six Hundred and Fifteen Dollars and Seventy-four Cents ($3,615.74), together with the said sum of Ninety-seven dollars and Ten cents ($97.10), with interest thereon at 7% per annum.

Third Count

1. Petitioner is a corporation duly organized and existing under the laws of the State of New Jersey, and for the purposes of jurisdiction is a citizen of the State of New Jersey.

2. The A. B. Small Company, hereinafter called the defendant, is a corporation organized and existing under the laws of the State of Georgia, having its principal office and place of business in the City of Macon, in the County of Bibb, and in the Western Division of the Southern District of Georgia, and for the purposes of jurisdiction is a citizen of the State of Georgia.

3. This suit is between citizens of different States, and the amount in controversy exclusive of interest and costs exceeds the sum of Three Thousand ($3,000.00) Dollars.

4. At all times hereinafter mentioned, petitioner was and now is engaged in the business of refining sugar and in the business of selling sugar in barrels and bags of various sizes and capacities, a barrel of 350 lbs. being by the custom of the trade the unit of quantity.

[fol. 9] 5. Defendant at all times hereinafter mentioned was and now is a wholesale grocer doing business in the City of Macon, and engaged, among other things, in buying and selling refined sugar.

6. Defendant is indebted to petitioner on open account for merchandise purchased in the sum of Fifty-one hundred eleven & 70/100 ($5,111.70) Dollars principal, besides interest thereon at the rate of seven (7) per cent. per annum from September 3, 1920. The bill of particulars being hereto attached and marked Exhibit E.

7. Said amount is just, true and unpaid, and the defendant fails and refuses to pay the same.

Wherefore, Petitioner prays judgment against the defendant in the sum of Fifty-one hundred eleven & 70/100 ($5,111.70) dollars principal, together with interest thereon at the rate of seven (7) per cent. per annum from September 3, 1920.

Wherefore, Petitioner prays that process may issue directed to the said defendant the A. B. Small Company, requiring it to be and appear at the next (October) Term of this Court to answer petitioner's complaint.

Jones, Park & Johnston, Petitioner's Attorneys.

[fol. 10] EXHIBIT (A)

Form 16

The American Sugar Refining Company

132 North Peters Street, New Orleans, Louisiana

United States Food Administration License Number F-0241

Buyer's Order No. —.
Ship to —— ——. Address: Same. (Option of routing is reserved by Seller.)
Subject to Acceptance by A. S. R. Co.
Order Number: F44. Date: 7/14/20.
Sold to A. B. Small Co. Address: Macon, Ga.
Delivering L. & N. C. of Ga. 467. Carrier: ——. 494.

Delivery complete on receipt of goods by carrier. Sellers ruling freight basis on day of shipment. This purchase to be invoiced and paid for at contract price. No allowances will be made for declines in market. This contract contingent on strikes, accidents, fire or other delays beyond seller's control. All additional import duties, excise or other taxes hereafter levied on the raw or refined sugar necessary to fill this contract at buyer's expense in addition to price specified.

Containers	Cases	Sacks	Bags	Half bbls.	Bbls.	Kind pkgs.	Grade	Price
		88				25	Domino Granulated	23167
			45			100	Fine "	22967
					12	wood	" "	22994

100 C 8310

Total barrels: 50.
Buyer: The A. B. Small Co.
Salesman: E. W. Timmerman.
United States Food Administration License Number: ——.

Barrels or equivalent at price of 22½ cents, assortment to be furnished seller by buyer before September 1, 1920, but subject to such substitutions as seller may find necessary to make. In event assortment is not furnished prompt seller reserves right to ship such grades as it has available at the time of shipment. Delivery to be made during September or as soon thereafter as possible. The buyer will accept delivery when made by seller. Seller is to have option of making delivery from any of its refineries all transportation charges to be for account of buyer. Subject to rules and regulations of any Government Department at time of shipment or delivery. United States Food Administration License Number G-14143.

The A. B. Small Co.

July 20, 1920.

[fol. 11] EXHIBIT "B"

Form 16

The American Sugar Refining Company

132 North Peters Street, New Orleans, Louisiana

United States Food Administration License Number F-0241

Buyer's Order No. D.
Ship to —— ——. Address: Same. (Option of routing is reserved by Seller.)
Subject to Acceptance by ——.
Order Number: F44. Date: September Contract, 7/22/20.
Sold to The A. B. Small Co., Macon, Ga.
Delivering Carrier: L. & N. C. of Ga.

Delivery complete on receipt of goods by carrier. Sellers ruling freight basis on day of shipment. This purchase to be invoiced and paid for at contract price. No allowances will be made for declines in market. This contract contingent on strikes, accidents, fire or other delays beyond seller's control. All additional import duties, excise or other taxes hereafter levied on the raw or refined sugar necessary to fill this contract at buyer's expense in addition to price specified.

Containers	Cases	Sacks	Bags	Half bbls.	Bbls.	Kind pkgs.	Grade	Price
		50				25	Domino Granulated	23167
		41				100	Fine "	22967
					24	wood	" "	22994

Total barrels: 50.
Buyer: A. B. Small Co., F. J. Lowe.
Salesman: E. W. Timmerman.
United States Food Administration License Number: ——.

Barrels or equivalent at price of 22½ cents, assortment to be furnished seller by buyer before September 1, 1920, but subject to such substitutions as seller may find necessary to make. In event assortment is not furnished prompt seller reserves right to ship such grades as it has available at the time of shipment. Delivery to be made during September or as soon thereafter as possible. The buyer will accept delivery when made by seller. Seller is to have option of making delivery from any of its refineries all transportation charges to be for account of buyer. Subject to rules and regulations of any Government Department at time of shipment or delivery. United States Food Administration License Number G-14143.

The A. B. Small Co.

July 24,, 1920.

[fol. 12] EXHIBIT "C" TO PETITION

The American Sugar Refining Company, 132 N. Peters St., New Orleans, La.

Buyer's No. —. Allotment —.
Terms: Cash, less 2% 7 days.
Ship to ——.
Address: ——.
Date: 7/22/20.
Sold to A. B. Small & Co.
Address: Macon, Ga.
Basis 22.50 Freight 46 7 49 4 (F. O. B. New Orleans).
L. & N.
(Option of Routing is Reserved by Seller.)

Delivery complete on receipt of goods by carrier. This purchase is to be invoiced and paid for at contract price. No allowances will be made for declines in market. This contract contingent on strikes, accidents, fire or other delays beyond seller's control.

All additional import duties, excise or other taxes hereafter levied on the raw or refined sugar necessary to fill this contract at buyer's expense in addition to price specified.

United States Food Administration License Number F 0241.

Sacks	Bags	Bbls.	Kind pkgs.	Grade	Price
50	..	..	25	D. G.	23.167
..	41	..	..	F. G.	22.967
..	..	24	..	" "	22.994
88	..	..	25	D. G.	23.167
			Sept.		
..	45	..	..	F. G.	22.967
..	..	12	..	" "	22.994

G. 14143.
Total barrels 100.
Sold by E. W. Timmerman.
O—#8310.
(Copy sent to Customers.)

[fol. 13] Seller reserves right to ship such grades as it has available at time of shipment, delivery to be during Sept. or as soon thereafter as is possible, and buyer will accept delivery when made by seller.

Seller is to have option of making delivery from any of its refineries.

All transportation charges to be for account of the buyer.

Subject to rules and regulations of any Government Department at time of shipment or delivery.

[fol. 14]

EXHIBIT D TO PETITION

Statement

New York, March 24, 1921.

The American Sugar Refining Company

A. B. Small Company, Macon, Georgia

Ordered, Refused and Resold for Account

Terms Net Cash

Debit

Date	Order number	Barrel equiv.	Pounds	Additional charges	
Sept. 3	8310	100	35,023		8,074.74
				Demurrage	14.70
				Unloading	5.00
				Storage	77.40
					8,171.84

Credit

Proceeds from Resales

Dec. 15	50350	1	8.50 less 2%	500	Cox & Chappell Co.	44.19
Dec. 15	50347	1	8.50 less 2%	300	H. D. Adams Co.	26.51
Dec. 15	50348	7	8.50 less 2%	2,500	H. J. Carr Co.	220.94
Dec. 15	50346	2	8.50 less 2%	500	Chapman Gro. Co.	44.19
Dec. 15	50349	3	8.50 less 2%	1,000	I. W. Rogers Co.	88.38

Dec. 14	50302	6	8.50 less 2%	2,192	Jones Gro. Co.	192.49		
Dec. 11	50303	4	9.00 less 2%	1,500	Marshall Gro. Co.	136.97		
Dec. 13	50304	4	8.75 less 2%	1,500	Jacques & Tinsley Co.	133.30		
Dec. 13	50305	8	8.75 less 2%	2,847	Kingman & Everett	254.05		
Dec. 13	50307	9	8.75 less 2%	3,000	Hill Wholesale Co.	269.54		
Dec. 13	50308	1	8.75 less 2%	200	J. A. Flournoy	17.78		
Dec. 11	50309	8	9.00 less 2%	2,798	Garrison Cook Morgan Co.	256.02		
Dec. 11	50310	3	9.00 less 2%	1,000	Jaques & Tinsley Co.	91.32		
Dec. 11	50311	..	9.00 less 2%	100	Gt. At. & Pac. Tea Co.	9.13		
Dec. 14	50313	3	8.75 less 2%	800	D. S. Brandon & Co.	71.09		
Dec. 14	50314	2	8.50 less 2%	700	A. J. Long Cig. & Gro. Co.	61.87		
Dec. 14	50315	3	8.50 less 2%	1,000	E. S. Street Co.	88.38		
Dec. 18	50412	2	8.00 less 2%	701	Jacques & Tinsley	57.27		
Dec. 18	50417	1	8.50 less 2%	500	" "	44.18		
Dec. 16	50411	4	8.50 less 2%	1,500	Gt. Atl. & Pac. Tea Co.	132.56		
Dec. 17	50414	5	8.00 less 2%	1,748	" "	142.82		
Dec. 18	50413	1	8.00 less 2%	351	Kingman & Everett	28.67		
Dec. 16	50415	5	8.50 less 2%	1,749	" "	152.71		
Dec. 16	50416	3	8.50 less 2%	1,100	C. D. Kenney Co.	97.22		
Dec. 20	50574	1	8.00 less 2%	349	Jaques & Tinsley Co.	28.52		
Dec. 20	50573	10	8.00 less 2%	3,477	Garrison Cook Morgan	284.08		
Dec. 20	50561	3	8.00 less 2%	1,052	Gt. Atl. & Pac. Tea Co.	85.96		
							$3,060.14	
					Balance Due		$5,111.70	

[fol. 15] EXHIBIT E TO PETITION

New York, March 24, 1921.

The American Sugar Refining Company, in Account with A. B. Small Company, Macon, Georgia

Terms Net Cash

Debit

Date	Order number	Barrel equiv.	Pounds	Additional charges	
Sept. 3	8310	100	35,023		8,074.74
				Demurrage	14.70
				Unloading	5.00
				Storage	77.40
					8,171.84

Credit

Proceeds from Resales

Dec. 15	50350	1	8.50 less 2%	500	Cox & Chappell Co.	44.19
Dec. 15	50347	1	8.50 less 2%	300	H. D. Adams Co.	26.51
Dec. 15	50348	7	8.50 less 2%	2,500	H. J. Carr Co.	220.94
Dec. 15	50346	2	8.50 less 2%	500	Chapman Gro. Co.	44.19
Dec. 15	50349	3	8.50 less 2%	1,000	I. W. Rogers Co.	88.38
Dec. 14	50302	6	8.50 less 2%	2,192	Jones Gro. Co.	192.49
Dec. 11	50303	4	9.00 less 2%	1,500	Marshall Gro. Co.	136.97
Dec. 13	50304	4	8.75 less 2%	1,500	Jacques & Tinsley Co.	133.30

Dec. 13	50305	8	8.75 less 2%	2,847	Kingman & Everett	254.05	
Dec. 13	50307	9	8.75 less 2%	3,000	Hill Wholesale Co.	269.54	
Dec. 13	50308	1	8.75 less 2%	200	J. A. Flournoy	17.78	
Dec. 11	50309	8	9.00 less 2%	2,798	Garrison Cook Morgan Co.	256.02	
Dec. 11	50310	3	9.00 less 2%	1,000	Jaques & Tinsley Co.	91.32	
Dec. 11	50311	..	9.00 less 2%	100	Gt. At. & Pac. Tea Co.	9.13	
Dec. 14	50313	3	8.75 less 2%	800	D. S. Brandon & Co.	71.09	
Dec. 14	50314	2	8.50 less 2%	700	A. J. Long Cig. & Gro. Co.	61.87	
Dec. 14	50315	3	8.50 less 2%	1,000	E. S. Street Co.	88.38	
Dec. 18	50412	2	8.00 less 2%	701	Jacques & Tinsley	57.27	
Dec. 18	50417	1	8.50 less 2%	500	" "	44.18	
Dec. 16	50411	4	8.50 less 2%	1,500	Gt. Atl. & Pac. Tea Co.	132.56	
Dec. 17	50414	5	8.00 less 2%	1,748	" "	142.82	
Dec. 18	50413	1	8.00 less 2%	351	Kingman & Everett	28.67	
Dec. 16	50415	5	8.50 less 2%	1,749	" "	152.71	
Dec. 16	50416	3	8.50 less 2%	1,100	C. D. Kenney Co.	97.22	
Dec. 20	50574	1	8.00 less 2%	349	Jaques & Tinsley Co.	28.52	
Dec. 20	50573	10	8.00 less 2%	3,477	Garrison Cook Morgan	284.08	
Dec. 20	50561	3	8.00 less 2%	1,052	Gt. Atl. & Pac. Tea Co.	85.96	
							$3,060.14
					Balance Due		$5,111.70

[File endorsement omitted.]

[fol. 16] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE SOUTHERN DISTRICT OF GEORGIA

[Title omitted]

DEMURRER—Filed Sept. 23, 1921

Comes now the above named defendant and demurs to the complaint in the above entitled cause and for ground of demurrer specifies:

1. The petition fails to set forth facts sufficient to constitute a cause of action against this defendant.

2. The petition sets forth no cause of action against this defendant in that it appears from Exhibits A, B and C attached to the petition that Exhibit C is not an unconditional acceptance of the offers contained in Exhibits A and B and contains no binding promises on the part of the alleged seller and was never executed by it.

3. The alleged orders of defendant were "subject to acceptance by American Sugar Refining Co." and Exhibit C does not show that said orders were ever accepted by plaintiff and therefore no contracts were ever consummated.

4. Exhibit C is not by its terms an unconditional effectual acceptance of the alleged offers set forth in exhibits A and B, and is not identical with the terms of the alleged offers, and therefore no contract appears by said pleadings to have been entered into between the parties, and the minds of the parties failed to meet regarding the terms of the said alleged contract.

5. The petition sets forth no cause of action for it appears therefrom that there are no contracts in writing to sell or buy the sugar alleged to have been bought and sold, and that the value of the sugar [fol. 17] exceeded $50.00.

6. Defendant shows that although its orders called for special amounts of sugar of specific grades known as Domino Granulated and Fine Granulated, and contained a provision "in event assortment is not furnished prompt, seller reserves the right to ship such grades as it has available at time of shipment." the alleged acceptance only pretended to cover "such grades as it (plaintiff) has available at time of shipment"; defendant shows that for this and other reasons appearing on the face of the alleged acceptance Exhibit C was not a valid, legal acceptance of defendant's orders contained in Exhibits A and B.

For special demurrer defendant shows:

1. Defendant demurs specially to the allegation in the eighth paragraph of the petition that plaintiff "accepted" the offers made by defendant, it not appearing how plaintiff accepted or what agent

of plaintiff accepted the offers. The mere allegation that plaintiff "accepted" and that the orders and acceptance constituted contracts is a conclusion of the pleader and immaterial, and the Exhibit C pleaded as constituting such acceptance is not unconditional and in identical terms with the alleged offers and does not show that the minds of the parties met, and does not constitute an effectual acceptance.

2. Defendant demurs specially to the conclusion of the pleader in the 9th paragraph of the petition in which it is alleged that contracts existed between the parties.

3. Defendant demurs specially to the conclusion of the pleader in the 10th paragraph of the petition in which it is alleged that contracts existed between the parties.

[fol. 18] 4. For special demurrer to paragraph 14 of the petition defendant says that the petition does not state the date of the arrival of the sugar in Macon, Georgia, the date of the refusal by defendant to accept the sugar, the date the sugar was stored, or the date that defendant was notified of its storage.

5. Defendant demurs specially to the allegation in the 17th paragraph of the petition that the resale was "within a reasonable time from the final rejection," it not appearing what plaintiff considered the "final rejection" or when said alleged final rejection took place. Moreover, such allegation is a mere conclusion of the pleader and immaterial.

Wherefore defendant prays that said plaintiff take nothing by its said action and that it be hence dismissed with its cost herein expended.

Count 2

Comes now the above named defendant and demurs to Count 2 of the complaint and for ground of demurrer specifies:

1. The petition fails to set forth facts sufficient to constitute a cause of action against this defendant.

2. The petition sets forth no cause of action against this defendant in that it appears from Exhibits A, B and C attached to the petition that Exhibit C is not an unconditional acceptance of the offers contained in Exhibits A and B and contains no binding promises on the part of the alleged seller and was never executed by it.

[fol. 19] 3. The alleged orders of defendant were "subject to acceptance by American Sugar Refining Co." and Exhibit C does not show that said orders were ever accepted by plaintiff and therefore no contracts were ever consummated.

4. Exhibit C is not by its terms an unconditional effectual acceptance of the alleged offers set forth in exhibits A and B, and is not

identical with the terms of the alleged offers, and therefore no contract appears by said pleadings to have been entered into between the parties, and the minds of the parties failed to meet regarding the terms of the said alleged contract.

5. The petition sets forth no cause of action for it appears therefrom that there are no contracts in writing to sell or buy the sugar alleged to have been bought and sold and that the value of the sugar exceeded $50.00.

6. Defendant shows that although its orders called for special amounts of sugar of specific grades known as Domino Granulated and Fine Granulated, and contained a provision "in event assortment is not furnished prompt, seller reserves the right to ship such grades as it has available at time of shipment," the alleged acceptance only pretended to cover "such grades as it (plaintiff) has available at time of shipment"; defendant shows that for this and other reasons appearing on the face of the alleged acceptance Exhibit C was not a valid, legal acceptance of defendant's orders contained in Exhibits A and B.

7. Defendant demurs to paragraph- 14 and 15 of said petition in which the plaintiff sets up the alleged market price of the sugar at the alleged final rejection of the shipment, and seeks to recover the difference between the contract price and the market price; because [fol. 20] said plaintiff having set forth in the first count that the resale was made at the risk and account of defendant, the said plaintiff thereby elected to treat the difference between the allegd contract price and the resale price as the measure of damages and cannot set forth the difference between the contract price and the market price at the time of the alleged breach of contract as the true measure of damages in view of such election.

For special demurrer defendant shows:

1. Defendant demurs specially to the allegation in the 8th paragraph of the petition that plaintiff "accepted" the offers made by defendant, it not appearing how plaintiff accepted or what agent of plaintiff accepted the offers. The mere allegation that plaintiff "accepted" and that the orders and acceptance constituted contracts is a conclusion of the pleader and immaterial, and the Exhibit C pleaded as constituting such acceptance is not unconditional and in identical terms with the alleged offers and does not show that the minds of the parties met, and does not constitute an effectual acceptance.

2. Defendant demurs specially to the conclusion of the pleader in the 9th paragraph of the petition in which it is alleged that contracts existed between the parties.

3. Defendant demurs specially to the conclusion of the pleader in the 10th paragraph of the petition in which it is alleged that contracts existed between the parties.

4. Defendant demurs specially to the allegations in the 14th paragraph of the petition as to the market price for Fine Granulated sugar at the time of the final rejection of the shipment, it not appearing what plaintiff considered a final rejection or when teh said final [fol. 21] rejection took place. Moreover the allegations as to the market value of the sugar is immaterial.

5. Defendant demurs specially to the allegations in paragraph 15 of the petition in which the difference between the alleged contract price of the sugar and the market price is stated, on the ground that such allegations are immaterial.

6. Defendant demurs specially to paragraph 15 of the petition and shows that said paragraph does not state the alleged market price of the sugar on the alleged date of the breach of contract at the time and place of delivery.

Wherefore defendant prays that said plaintiff take nothing by its said action and that it be hence dismissed with its cost herein expended.

Count 3

Comes now the above named defendant and demurs to Count 3 of the complaint and for ground of demurrer specifies:

1. Said petition fails to set forth facts sufficient to constitute a cause of action against this defendant.

2. Defendant demurs to paragraph 6 of the petition in which plaintiff alleges that defendant is indebted to it on an open account, because said plaintiff having set forth in Count 1 that a resale was [fol. 22] made at the risk of defendant and having in Count 2 alleged that defendant was indebted to plaintiff for the difference between an alleged contract price and an alleged market price of said sugar at the date of the breach of the alleged contract, the said plaintiff thereby elected to treat the difference between the alleged contract price and the resale price, or the difference between the contract price and the market price, as the measure of damages and cannot set out and recover from defendant on the theory that defendant is indebted to plaintiff on an open account in view of such election.

3. Said petition in Count 3 does not show that plaintiff ever entered into an executory or executed contract with defendant for the merchandise in question, or that delivery of said merchandise was ever made to defendant.

Wherefore defendant prays that said plaintiff take nothing by its said action and that it be hence dismissed with its cost herein expended.

Demurrer to All Three Counts

And defendant shows that the said plaintiff should be required to elect between the three counts of the said petition, for in the first

count plaintiff claims that the true measure of damages is the difference between the contract price and the price brought on resale made by plaintiff after notice to defendant, which amounted to an alleged sum; and in the second count plaintiff claims the true measure of damages is the difference between the contract price and the market price at the date of the alleged breach, which is a different amount; and in the third count plaintiff claims the true measure of damages should be based on the theory that the transactions involved in this suit were on an open account for merchandise, which is a different amount; and plaintiff was required to elect under the laws [fol. 23] of Georgia for what damages it would seek to claim against the defendant, and having elected to make a resale it cannot, in spite of that remedy sought by it, now choose a different measure of damages for the alleged breach of the contract.

Wherefore defendant prays that said plaintiff take nothing by its said action and that it be hence dismissed with its cost herein expended.

Saussy & Saussy, Watkins, Russell & Asbill, Counsel for Defendant.

Jurat showing the foregoing was duly sworn to by Saussy & Saussy et al. omitted in printing.

[Filed endorsement omitted.]

[fol. 24] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE SOUTHERN DISTRICT OF GEORGIA

[Title omitted]

ANSWER—Filed Sept. 23, 1921

Subject to the demurrer filed in this case, the defendant by its attorneys at law answers the petition of plaintiff as follows:

1. For want of sufficient information, defendant is unable to admit or deny paragraph one of petition.

2. Defendant admits paragraph two of petition.

3. Answering paragraph three of the petition defendant admits that it is a citizen of Georgia; for want of sufficient information defendant can neither admit nor deny the allegation as to plaintiff's citizenship; defendant admits that the amount sued for exceeds $3,000 but denies that it is indebted to plaintiff in any amount.

4. For want of sufficient information defendant can neither admit nor deny paragraph four of petition.

5. Defendant admits paragraph five of petition.

6. Defendant admits that it executed the order described in paragraph 6 of the petition and set forth more specifically as Exhibit "A" attached to the petition.

7. Defendant admits that it executed the order described in paragraph 7 of the petition and set forth more specifically as Exhibit "B" attached to the petition.

8. Answering paragraph 8 of the petition, defendant denies that its orders were ever accepted by plaintiff or by anyone acting for plaintiff, and denies that Exhibit "C" attached to the petition is an [fol. 25] acceptance of defendant's orders, Exhibits "A" and "B" attached to petition or that Exhibit "C" was ever executed by plaintiff or any one acting in its behalf, and denies that Exhibits "A," "B" and "C" ever amounted to contracts between plaintiff and defendant.

9. Defendant denies paragraph 9 of the petition and denies that defendant was ever bound by any contract to accept or pay for any sugar alleged to have been purchased from plaintiff.

10. Defendant denies paragraph 10 of the complaint, and denies that any contract was ever made between plaintiff and defendant under which plaintiff had a right to deliver any sugar to defendant.

11. Paragraph 11 of the petition is denied. Defendant denies that plaintiff had any right to ship any sugar to defendant or to send any invoices of shipment to defendant, denies that defendant was bound by any contract to purchase any sugar from plaintiff, or that the price of sugar could be fixed by orders of defendant.

12. Defendant admits sending the telegram and letter referred to in paragraph 12 of the petition, but denies that plaintiff had any right to ship any sugar to defendant, or that defendant was obliged to accept such a shipment.

13. Defendant admits that plaintiff wrote the letter described in paragraph 13 of the petition, but denies that any contract existed between the parties for the purchase and sale of the sugar in question, and denies that defendant was obligated to accept any sugar from plaintiff or pay for same.

14. Answering paragraph 14 of petition, defendant admits that it refused to accept the sugar mentioned therein. For want of sufficient information defendant can neither admit nor deny that the sugar was stowed as alleged; defendant denies that plaintiff had any right to store the sugar for defendant's account, or that plaintiff could, by storing the sugar render defendant liable for storage charges. De- [fol. 26] fendant admits that plaintiff wrote it that the sugar was stored as alleged.

15. Answering paragraph 15 of petition, defendant admits that it refused at all times to accept the sugar; defendant denies that it was under any obligation to accept the sugar mentioned, or that any contract for the purchase and sale of said sugar was ever entered into be-

tween plaintiff and defendant. Defendant admits receiving the telegram referred to, but denies that plaintiff had any right or could sell said sugar for defendant's account.

16. Paragraph 16 of the petition is admitted. Defendant denies that it was under any obligation to accept any sugar from plaintiff, or that plaintiff could sell the sugar for defendant's account, or that defendant was under any obligation to answer the telegram.

17. Defendant denies paragraph 17 of the petition; denies that plaintiff could or did resell the sugar so as to render defendant liable in any amount, and it denies the defendant was bound or obligated to accept the sugar therein mentioned.

18. Further answering paragragh 17 of petition, defendant shows that the resale alleged to be based on the order of defendant was not, as shown by Exhibit "D" attached to the petition, made within a reasonable time after defendant notified plaintiff by wire dated October 7, 1920, that defendant would not accept the sugar shipped by plaintiff.

19. Answering paragraph 18 of the petition, defendant denies that plaintiff ever made the resales alleged therein and set out in Exhibit "D" attached to the petition, or that plaintiff ever received any amount from said resales, or that plaintiff ever resold the sugar to the alleged buyers. Defendant denies that it is obligated, because of any storage, demurrage or unloading charges incurred by plaintiff in handling the sugar, or that defendant was ever obliged to accept the sugar.

[fol. 27] 20. Defendant admits receiving the copy referred to in paragraph 19 of the petition, but denies that any resale was ever made by plaintiff for defendant's account, or that such resale could be made so as to obligate defendant.

21. Defendant admits the demand upon it by plaintiff for the amount mentioned in paragraph 20, but denies that it is or was liable to plaintiff in any amount, denies that any contract ever existed between the parties for the purchase and sale of the sugar in question, or that resale was or could be made for account of defendant, and denies that defendant is liable to plaintiff for storage, demurrage or unloading charges incurred by plaintiff.

22. Paragraph 21 of the petition is admitted. Further answering said paragraph, defendant shows that no contract existed between the parties for the purchase and sale of sugar and that it is not liable to plaintiff in any amount.

23. Defendant shows that under no circumstances is plaintiff entitled to sue defendant, even if the contract were valid and enforceable; for more than 1¢ per pound profit on what the said sugar cost the said plaintiff, which was prima facie reasonable profit that was fixed by the President of the United States by Act of Congress dated August 10, 1917, and at all events said plaintiff would not be entitled to more than a reasonable profit on said cost price of said sugar, and

this defendant shows that under no circumstances should said plaintiff have and recover anything more than a reasonable profit on the cost price of said sugar and said plaintiff, if the court should determine that said contract is valid and enforceable.

24. For further answer, defendant shows that the E. W. Timmerman whose name appears on Exhibits A, B, and C, was not an agent of defendant or authorized to act for defendant in making the contract; defendant denies that any of said Exhibits was ever signed by the said E. W. Timmerman in behalf of or on account of defendant, [fol. 28] or that defendant ever contracted with the plaintiff through said Timmerman.

25. For further answer herein, defendant shows that under no circumstances should it be required to accept the sugar described in the petition, for that in selling said sugar for future delivery and for delivery more than thirty days after the alleged contract of sale, plaintiff violated the Act of Congress known as the Food Control or Lever Act, being the Act of August 10, 1917, as amended by Act of October 22, 1919, in that said sale tended to increase the price of sugar and to promote the hoarding thereof.

Whereof defendant prays that said action may be dismissed and that it may have judgment for its costs.

Count 2

Answering Count 2 of the petition, defendant shows:

1. For want of sufficient information, defendant is unable to admit or deny paragraph 1 of the petition.

2. Defendant admits paragraph 2 of the petition.

3. Answering paragraph 3 of the petition, defendant admits that it is a citizen of Georgia, for want of sufficient information defendant can neither admit nor deny the allegation as to plaintiff's citizenship; defendant admits that the amount sued for exceeds $3,000.00, but denies that it is indebted to plaintiff in any amount.

4. For want of sufficient information defendant can neither admit or deny paragraph 4 of the petition.

5. Defendant admits paragraph 5 of the petition.

6. Defendant admits that it executed the order described in paragraph 6 of the petition and set forth more specifically as Exhibit A attached to the petition.

7. Defendant admits that it executed the order described in paragraph 7 of the petition and set *more* more specifically as Exhibit B attached to the petition.

[fol. 29] 8. Answering paragraph 8 of the petition, defendant denies that its orders were ever accepted by plaintiff or by anyone acting for Plaintiff and denies that Exhibit C attached to the petition is

an acceptance of defen-t's orders, Exhibits A and B attached to the petition, or that Exhibit C was ever executed by plaintiff or anyone acting in its behalf, and denies that Exhibits A, B, and C, ever amounted to contracts between plaintiff and defendant.

9. Defendant denies paragraph 9 of the petition and denies that defendant was ever bound by any contract to accept or pay for any sugar alleged to have been purchased from plaintiff.

10. Defendant denies paragraph 10 of the complaint and denies that any contract was ever made between plaintiff and defendant under which plaintiff had a right to deliver any sugar to defendant.

11. Paragraph II of the petition is denied. Defendant denies that plaintiff had any right to ship any sugar to defendant or to send any invoices of shipment to defendant; denies that defendant was bound by any contract to purchase any sugar from plaintiff, or that the price of sugar could be fixed by order of the defendant.

12. Defendant admits sending the telegram and letter referred to in paragraph 12 of the petition, but denies that plaintiff had any right to ship any sugar to defendant, or that defendant was obligated to accept such a shipment.

13. Defendant admits that plaintiff wrote the letter described in paragraph 13 of the petition but denies that any contract existed between the parties for the purchase and sale of the sugar in question, and denies that defendant was obligated to accept any sugar from plaintiff or to pay for same.

[fol. 30] 14. Answering paragraph 14 of the petition, defendant says that for lack of sufficient information it can neither admit nor deny the allegation as to the market price per pound of the sugar at an unstated time and unnamed place. Defendant denies that it purchased any sugar from plaintiff or that it was ever obligated to accept any sugar from plaintiff or that defendant ever refused to accept any sugar from plaintiff which defendant was bound by contract to accept. For want of sufficient information defendant can neither admit nor deny the allegations as to the market value of the sugar in question.

15. Further answering paragraph 14 of the petition, defendant says that on September 7, 1920, it telegraphed plaintiff that the shipment made by the plaintiff to defendant on September 3, 1920, would be refused by defendant.

16. Paragraph 15 of the petition is denied in so far as it alleges a contract between plaintiff and defendant. Defendant denies that it entered into any contract with plaintiff whereby plaintiff had a right to deliver any sugar to defendant.

17. Paragraph 16 of the petition is denied. Defendants denies that it entered into any contract with plaintiff to purchase the sugar in *w*uestion or that it was obligated to accept and pay for any sugar. Defendant denies that it has damaged plaintiff in any amount.

18. Paragraph 17 of the petition is denied. Defendant denies that plaintiff did or could bind defendant by shipping any sugar to it, and denies that it was under any obligation to accept the sugar or that it is liable to plaintiff in any amount for expenses incurred by plaintiff in handling said sugar, including demurrage, storage and unloading expenses.

19. Defendants shows that under no circumstances is plaintiff entitled to sue defendant, even if the contract was valid and enforceable, for more than one cent per pound profit on what the said sugar cost the plaintiff, which was the prima facie reasonable profit that was fixed by the President of the United States by Act of Congress dated August 10, 1917, and at all events said plaintiff would not be en- [fol. 31] titled to more than a reasonable profit on said cost price of said sugar; and this defendant shows that under no circumstances should said plaintiff have and recover anything more than a reasonable profit on the cost price of said sugar to said plaintiff, if the court should determine that said contract is valid and enforceable.

20. For further answer, defendants shows that the E. W. Timmerman, whose name appears on Exhibits A, B and C, was not an agent of defendant or authorized to act for defendant in making the contract; defendant denies that any of said Exhibits was ever signed by the said E. W. Timmerman in behalf of or on account of defendant, or that defendant ever contracted with plaintiff through said Timmerman.

21. For further answer herein, defendant shows that under no circumstances should it be required to accept the sugar described in the petition, for that in selling said sugar for future delivery and for delivery more than thirty days after the alleged contract of sale, plaintiff violated the Act of Congress known as the Food Control or Lever Act, being the Act of Congress of August 10, 1917 as amended by Act of October 22, 1919, in that said sale tended to increase the price of sugar and to promote the hoarding thereof.

Wherefore defendant prays that said action may be dismissed and that it may have judgment for its cost.

Count 3

Answering Count 3 of the petition defendants shows:

1. For want of sufficient information, defendant is unable to admit or deny paragraph 1 of the petition.

2. Defendant admits paragraph 2 of the petition.

3. Answering paragraph 3 of the petition, defendant admits that it is a citizen of Georgia; for want of sufficient information defendant can neither admit nor deny the allegation as to plaintiff's citizenship; defendant admits that the amount sued for exceeds $3,000.00 but denies that it is indebted to plaintiff in any amount.

[fol. 32] 4. For want of sufficient information defendant can neither admit nor deny paragraph 4 of the petition.

5. Defendant admits paragraph 5 of the petition.

6. Paragraph 6 of the petition is denied. Defendant denies that it ever purchased or contracted to purchase the merchandise in question from plaintiff or that the same was ever delivered to defendant, and denies the allegations contained in Exhibit E attached to the petition.

7. Defendants denies paragraph 7 of the petition.

Wherefore defendant prays that said action may be dismissed and that it may have judgment for its cost.

Dated the 22nd day of September, 1921.

Saussy & Saussy, Watkins, Russell & Asbill, Counsel for Defendant.

[File endorsement omitted.]

[fol. 33] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE SOUTHERN DISTRICT OF GEORGIA

[Title omitted]

DEMURRER TO ANSWER—Filed Mar. 10, 1922

Comes now The American Sugar Refining Company, plaintiff, and demurs to the answer of the defendant, upon the following grounds:

First Count

1. Plaintiff demurs generally to the First Count because the same sets up no matter of defense to plaintiff's petition.

2. Plaintiff specially demurs to so much of paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21 and 22, as deny that the orders of the defendant and the confirmation of the sale by the plaintiff set out in Exhibits A, B and C, attached to and made a part of the petition, constitute binding contracts between the plaintiff and the defendant; that the defendant was bound by said contracts to accept the sugar in said contracts described; that plaintiff had a right under said contracts to ship sugar to the defendant; that defendant was obligated to accept the sugar so shipped, or receive and pay for the same; and that plaintiff had a right to store the sugar for defendant's account, or to resell the sugar for the account of the defendant, upon the ground that said several allegations are conclusions of the pleader; that they raise questions of law rather than

questions of fact, which questions can only be determined upon demurrer to the petition; and that said conclusions are contrary to law.

[fol. 34] 3. Plaintiff demurs to paragraphs 23 and 25, upon the ground that said paragraphs set up no matter of defense to plaintiff's petition; that the Act of Congress approved August 10, 1917, is unconstitutional, null and void and of no effect because in violation of and repugnant to the fifth and sixth amendments to the Constitution of the United States; that said Act of Congress fixed no ascertained standard of guilt; is inadequate to inform persons accused of violations thereof of the nature and cause of the accusations against them; is an attempt to delegate legislative power to courts and juries, and is too vague, general and indefinite in its terms to be capable of enforcement either criminally or civilly, and attempts to penalize indefinite acts; that no authority was lawfully vested in the President, or in any Department or Officer of the United States, to fix a reasonable profit on sugar because of the vagueness, uncertainty and unenforceability of said Act of Congress, and that said paragraphs are conclusions of the pleader.

Second Count

1. Plaintiff demurs generally to the Second Count because the same sets up no matter of defense to plaintiff's petition.

2. Plaintiff specially demurs to so much of paragraphs 8, 9, 10, 11, 12, 13, 14, 16, 17 and 18, as deny that the orders of the defendant and the confirmation of the sale by the plaintiff set out in Exhibits A, B and C, attached to and made a part of the petition, constitute binding contracts between the plaintiff and the defendant; that the defendant was bound by said contracts to accept the sugar in said contracts described; that plaintiff had a right under said contracts to ship sugar to the defendant; that defendant was obligated to accept the sugar so shipped, or receive and pay for the same; and that plaintiff had a right to store the sugar for defendant's account, or to resell the sugar for the account of the defendant, [fol. 35] upon the ground that said several allegations are conclusions of the pleader; that they raise questions of law rather than questions of fact, which questions can only be determined upon demurrer to the petition; and that said conclusions are contrary to law.

3. Plaintiff demurs to paragraphs 19 and 21, upon the ground that said paragraphs set up no matter of defense to plaintiff's petition; that the Act of Congress approved August 10, 1917, is unconstitutional, null and void and of no effect because in violation of and repugnant to the fifth and sixth amendments to the Constitution of the United States; that said Act of Congress fixed no ascertainable standard of guilt; is inadequate to inform persons accused of violations thereof of the nature and cause of the accusations against them; is an attempt to delegate legislative power to courts and juries, and

is too vague, general and indefinite in its terms to be capable of enforcement either criminally or civilly, and attempts to penalize indefinite acts; that no authority was lawfully vested in the President, or in any Department or Officer of the United States, to fix a reasonable profit on sugar because of the vagueness, uncertainty and unenforceability of said Act of Congress, and that said garagraphs are conclusions of the pleader.

Wherefore, plaintiff prays that said several paragraphs and parts of paragraphs may be stricken.

Jones, Park & Johnston, Plaintiff's Attorneys.

[File endorsement omitted.]

[fol. 36] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE SOUTHERN DISTRICT OF GEORGIA

[Title omitted]

AMENDED PETITION—Filed Mar. 7, 1923

Comes now the plaintiff, the American Sugar Refining Company, and by leave of the Court first had, amends its petition in the following particulars, to-wit:

First Count

1. By inserting after paragraph five of the first count the following additional paragraphs, to-wit:

5-a. The word "assortment" appearing in contracts and sales memoranda for the sale of sugar means specifications of grades of sugar and the kind of packages in which delivery is to be made.

5-b. The price of sugar is based on fine granulated sugar in bulk, packed in barrels of 350 pounds net average weight, the price of any other grade or package being determined by adding to or substracting from the basis price the amount of standard trade differentials applicable to other grades or packages.

5-c. At the time of making the contracts hereinafter referred to, [fol. 37] and for a long period of time prior thereto, there were in the sugar trade certain fixed and determined standard trade differtials which were known to and recognized and applied by all refiners, brokers and dealers in refined sugar in all transactions involving sales, purchases or quotations of refined sugar at a basis price.

2. By striking paragraph fourteen of the first count and inserting in lieu thereof the following:

"The said sugar was recieved at Macon, Georgia, the point of destination, on or about the 16th day of September, 1920, and was immediately tendered to the defendant, who thereupon refused to accept the same, and the said sugar was on the date refused stored in the warehouse of Ouzts, Michell & Whaley at Macon, Georgia, for the account of the defendant and the defendant was immediately advised of this disposition thereof, and was informed that storage charges would be for his account. A previous notice to this effect had been given to defendant before the arrival of the sugar."

Plaintiff amends paragraph seventeen of the first count as follows:

By inserting at the beginning of said paragraph the following: "Immediately on the delivery of said sugar at Macon, Georgia, plaintiff tendered the same to the defendant, and from time to time thereafter continued to tender the same until the said 30th day of November, 1920, when plaintiff notified defendant that unless it should accept and pay for the same at once, plaintiff would resell the [fol. 38] sugar for the defendant's account. The failure of the defendant to accept the sugar in response to this notice plaintiff accepted as a final rejection thereof."

Second Count

1. By inserting after paragraph five of the second count the following additional paragraphs, to-wit:

5-a. The word "assortment" appearing in contracts and sales memoranda for the sale of sugar means specifications of grades of sugar and the kind of packages in which delivery is to be made.

5-b. The price of sugar is based on fine granulated sugar in bulk, packed in barrels of 350 pounds net average weight, the price of any other grade or package being determined by adding to or substracting from the basis price the amount of standard trade differentials applicable to other grades or packages.

5-c. At the time of making the contracts hereinafter referred to, and for a long period of time prior thereto, there were in the sugar trade certain fixed and determined standard trade differentials which were known to and recognized and applied by all refiners, brokers and dealers in refined sugar in all transactions involving sales, purchases or quotations of refined sugar at a basis price.

2. Plaintiff further amends the second count by inserting after paragraph thirteen the following:

[fol. 39] "13-a. The sugar arrived in Macon, Georgia, the point of destination, on the 16th day of September, 1920, and was immediately tendered to the defendant, who thereupon rejected the same. The plaintiff then stored the sugar for the account of the defendant, and from time to time tendered and kept tendering the same to the defendant until the 30th day of November, 1920, when the defendant finally rejected the same.

3. Plaintiff amends paragraph fifteen of the second count by adding at the end thereof the following:

"Said sugar was shipped by plaintiff from its refinery at New Orleans, Louisiana, and by the terms of the contract, delivery was complete on receipt of the sugar by the carrier. The market price hereinbefore referred to was the market price at New Orleans. The said market price was the same at Macon, Georgia, the point to which the sugar was shipped except that freight was added, the market price of sugar being based on the price at the refinery."

Third Count

Plaintiff amends the third count as follows:

By striking in paragraph six thereof the word "purchased" and inserting in lieu thereof the words "sold and delivered."

Jones, Park & Johnston, Plaintiff's Attorneys.

Amendment allowed this 7th day of March, 1923.

Wm. H. Barrett, U. S. Judge.

[File endorsement omitted.]

[fol. 40] In the District Court of the United States for the Western Division of the Southern District of Georgia

[Title omitted]

Order on Demurrers—Filed Mar. 7, 1923

This cause coming on for a hearing on the demurrer filed by the defendant to the plaintiff's petition and the demurrer filed by the plaintiff to the defendant's answer, after argument had, it is considered, ordered and adjudged by the Court:

1. That the general demurrer to the petition be overruled on each and all of the grounds thereof.

2. Plaintiff having amended the petition to meet certain of the grounds of the special demurrer, the special demurrer to the petition is overruled upon each and all of the grounds thereof.

3. The general demurrer to the answer to the first and second counts of the petition is overruled.

4. The special demurrer addressed to certain portions of paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21 and 22 of the answer to the first count is sustained and the parts of the paragraphs demurred to are stricken.

5. The special demurrer to paragraphs 23 and 25 of the answer to the first count are sustained and said paragraphs are stricken.

6. The special demurrer to paragraphs 8, 9 and 10, 11, 12, 13, 14, 16, 17, and 18 of the answer to the second count is sustained [fol. 41] and the portions of the paragraphs demurred to are stricken.

7. Special demurrer to paragraphs 19 and 21 of the answer to the second count are sustained, and said paragraphs are stricken.

And it is so ordered this 5th day of March, 1923.

Wm. H. Barrett, United States Judge.

[File endorsement omitted.]

[fol. 42] IN UNITED STATES DISTRICT COURT

CHARGE OF THE COURT—Filed Apr. 17, 1923

Gentlemen of the jury, this suit is, as you recognize, based upon the alleged breach of a contract—I believe there were two, but made at the same time, so I will treat it throughout as one. The suit is brought in three counts, all of which, however, involve the same contract and the same breach. The only difference that would arise from those three counts would be as to the measure of the damages that would ensue. Under one theory, the plaintiff claims the right to recover the full purchase price because it carried out its contract by delivering the goods to the railroad company, which was the agent of the purchaser by agreement in the contract itself, and, therefore, that completed the seller's obligation. The title of the goods passed to the purchaser at that time—whenever it was delivered to the railroad company, and immediately the purchaser became indebted to the seller the full stipulated amount of the contract price. The seller having delivered the goods, thus carrying [fol. 43] out his contract as he claims, was under no obligation to do anything with the sugar. He could have just left it to whatever chance might occur to it, either for the railroad company to handle it to get its freight out of it or for the purchaser to take it and use it as he wanted to; but, it claims that it had a right in the nature of a lien on these goods which it could enforce in order to reimburse itself to that extent. It claims that this right of taking possession of the goods and selling them in the exercise of this foreclosure of the lien was a right that could be exercised at any time before payment; that there was no need to exercise that right at once, but it could exercise it at any time during the continuance of the non-payment of the purchase money, and they claim that under the exercise of that right the goods were stored by agreement—that is the suggestion was made by the purchasers, A. B. Small Company, that they be stored [fol. 44] in a warehouse in Macon in order to save the demurrage charges of the railroad. The plaintiff claims, and you will see from the correspondence that it seems to be a fact, though it is ultimately for you to pass upon as to that, that the seller notified the purchaser, Small & Company, that the goods were stored for Small's account

and that Small would be charged with the storage charges and that no effort was made on the part of the seller to exercise this lien until November 30, 1920, at which time you will find that a telegram was sent by the Refining Company to Small to the effect that if he did not take the sugar that it, the Refining Company, would sell it for his account. I charge you that was its right, if you find the facts as claimed by the plaintiff. The importance of that will be as to the date, because if that was its right, to take possession at any time pending payment, then they had to sell it only after that time, and [fol. 45] they sold it, I believe, on the 11th and 20th of December. Another count is upon the theory that if it is not to be governed by a statute to which you have heard reference here, of our Georgia law, that if the contract had been breached as it admittedly had been—that is the contract was established, it is admitted it was breached—that then if the first claim is not sustained by the evidence, that then they would have a right to have sold the goods at any reasonable time after the 30th of September, which was the date for delivery under the contract. Of course, in that case, there would be a difference between the first of October and the December dates as to what would be a reasonable time.

In view of the urge of plaintiff, both in its petition and at this time, I charge you that you may disregard the existence of that right [fol. 46] if you believe the plaintiff did not take possession under this lien as outlined in the first count until the 30th of November, and, if you believe those facts, you will simply apply your mind to the solution of the fact of whether a sale between the 30th of November and the 20th of December was a reasonable time. There has been no evidence to show that the sale was not made fairly. If you believe the facts have not been established as to the plaintiff taking possession until the 30th of November, then it would be competent for you to determine whether the sale was made within a reasonable time and with proper diligence between the 30th of September and the December dates. The other count is, that in the event you should not believe the facts sustain the counts I have discussed, that then your measure of damages would be the difference between the market value of the goods at the time and place they should have [fol. 47] been delivered, which was the 30th of September, at New Orleans, I believe, and the contract price, whatever that was. You need not consider this count if you believe that either one of the other two have been established; that is, if you believe not only that the contract of sale was made but that the actual delivery was made by delivery to the carrier, you should apply the rule that the vendor had the right to take possession of the goods any time up until the time of payment, and if you believe he did exercise that right by taking possession on the 30th of November and sold it within a reasonable time thereafter, that would end your duties and you need not regard the evidence bearing on the other two counts because that would bring the same amount as the second count. If you don't believe that was established, but believe he exercised the right of sale within a reasonable time, even though delivery of the goods had not [fol. 48] been made, then your verdict would be for the same amount as under the first count. If you do not believe either of these, then

you will determine as to the difference between the contract price and the market price at the time and place for delivery.

The request to charge has been made that if you consider count one in rendering your verdict, you are charged that before a resale can be binding, it must have been made after notice and within a reasonable time, of which you are the judge, and each such resale must be made fairly and with good faith to the defendant. If the resales, or any of them, were not made within a reasonable time, fairly and in good faith, you will disregard count one.

I have not followed the number of the counts in the petition, but I followed in what seemed to be the logical sequence of the claim of the plaintiff. The first count I discussed is the one he claims [fol. 49] most to his benefit. While it will give the same amount as the second count, it relieves you from considering anything about time before November 30th. I charge you that, of course, the sale by the plaintiff, whenever made, must have been made fairly and with reasonable diligence, but you cannot presume unfairness; there must be evidence to sustain unfairness or lack of diligence; you cannot merely imagine that it could have been done better. I say that because I have not heard any evidence that charges unfairness.

Mr. Watkins: We think the circumstances show it.

The Court: That is for the jury to determine; the sale must be made fairly. If you believe they have not been fair and diligent and done in the same way they would have done if selling their own sugar—that would be the measure of their obligation.

[fol. 50] Mr. Park: We except to the charge on the resale count and on the market value count for this reason. Your honor has charged the law as we understand it on the third count—that they had a right to sell at any time. Now the facts as to the shipment, as to the storage, as to when he took charge of it, are all in writing; the construction of those documents is for the court. There is no conflict in the evidence and therefore we submit that the court is submitting to the jury a question of fact that does not exist.

The Court: I instruct the jury that you will examine the evidence; if you find it is in writing and there is no conflict, your verdict will be inevitable, and if you find the facts are that the goods were sold and the delivery was made by delivery to the carrier, that they are [fol. 51] facts applying to the first count.

Mr. Park: I desire to make a motion that you direct a verdict on the first count.

The Court: I overrule the motion.

Mr. Watkins: I desire to note an exception to the Court submitting all three counts to the jury. I think the Court should have selected a count and submitted it.

The Court: I do not care to correct that. You understand it is quite authorized that you may have separate counts. If you prove one, that may exclude the others, but if you do not prove one, you may fall back on the others.

Mr. Watkins: We except to the Court fixing November 30th as the time from which a reasonable time should be figured. I construe [fol. 52] the plaintiff as being always in possession.

The Court: If you believe that the facts have established that the sugar was delivered to the carrier and the contract called for that, that would be a delivery to the purchaser, and the right therefore of taking possession of it up until the time of payment would apply, and inasmuch as the only evidence in the case is November 30th, I charge you that is the date.

The foregoing eleven (11) pages are approved as containing a true and correct transcript of the charge of the Court to the jury in the case of American Sugar Refining Co. vs. A. B. Small Co., together with exceptions noted by counsel.

This March 24, 1923.

Wm. H. Barrett, U. S. Judge.

[File endorsement omitted.]

[fol. 53] IN UNITED STATES DISTRICT COURT

VERDICT—Filed Mar. 7, 1923

We, the jury, find verdict in favor of plaintiff, on the first count, in the amount of Five Thousand One Hundred and Eleven Dollars and Seventy Cents ($5,111.70), with interest thereon at 7% from October 5th, 1920.

W. A. Lane, Foreman.

Macon, Ga., March 7, 1923.

[File endorsement omitted.]

[fol. 54] IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed Mar. 9, 1923

The jury having returned a verdict in favor of the plaintiff against the defendant for the sum of $5,111.70 principal, with interest on said sum from the 5th day of October, 1920, at the rate of 7% per annum,

It is thereupon considered, ordered and adjudged by the Court that the plaintiff, The American Sugar Refining Company, do have and recover of the defendant, The A. B. Small Company, the said sum of $5,111.70 principal, and $866.72 interest on said sum to this date; future interest at the rate of 7% per annum, and the costs of the suit to be taxed by the Clerk.

This 9th day of March, 1923.

Wm. H. Barrett, United States Judge. Jones, Park & Johnston, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 55] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA, WESTERN DIVISION

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed May 5, 1923

And now comes The A. B. Small Company, defendant herein, and says:

That on or about the 7th day of March, 1923, the District Court entered a judgment herein in favor of the plaintiff and against this defendant in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the Assignment of Errors which is filed with this petition.

Wherefore, this defendant prays that a Writ of Error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Fred T. Saussy, MacAsbell, Horace Russell, Edgar Watkins,
Attorneys for Defendant.

[File endorsement omitted.]

[fol. 56] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE SOUTHERN DISTRICT OF GEORGIA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed May 5, 1923

Comes now The A. B. Small Company, a corporation, defendant herein, and in connection with its petition for Writ of Error in this cause assigns the following errors which it avers occurred on the trial of the above stated cause and in the verdict of the jury and the entry of the judgment in favor of the plaintiff and against the defendant, and upon which errors it relies to reverse the judgment entered herein as appears of record:

1. Because the court erred in its ruling on the demurrer of the plaintiff to the answer of this defendant in sustaining the said demurrer and in holding that the Act of Congress approved August 10, 1917, known as the Lever Act, is unconstitutional, null, and void, because in violation of and repugnant to the fifth and sixth Amendments to the Constitution of the United States.

2. Because the court erred in striking those parts of this defendant's answer wherein defendant pleaded and relied upon the Act of [fol. 57] Congress of August 10, 1917, chapter 53, page 276, which Act defendant pleaded as a valid, constitutional statute of the United States, and which Act was contended by plaintiff in the demurrer to defendant's answer to be unconstitutional, null and void, in violation of and repugnant to the fifth and sixth Amendments to the Constitution of the United States.

3. Because the court erred in not sustaining the demurrer of the defendant to all of the counts of plaintiff's petition, such demurrer claiming and plaintiff's pleadings showing that the alleged contracts sued on by plaintiff were "subject to acceptance by American Sugar Refining Company," and the pleadings further showing that there had been no acceptance by said American Sugar Refining Company.

4. Because the court erred in not sustaining defendant's demurrer to all the counts of plaintiff's petition, said demurrer directing the attention of the court to the fact that no contract had ever been entered into between the parties as appeared from the pleadings, because the offer of this defendant to contract contained a provision as follows:

"In event the assortment is not furnished prompt, seller reserves the right to ship such grades as it has available at the time of shipment,"

and the alleged acceptance giving the seller, not, as the offer gave, a conditional right to ship such grades as it had available, but the absolute right to select such grades as were available to it, such offer and acceptance being different no contract was made, and the court erred in not sustaining defendant's demurrer to that effect.

[fol. 58] 5. Because the court erred in admitting over the objections of the defendant the offer to contract and the claimed conformation thereof, it being objected that there was no acceptance of the offer in terms in which it is made, the offer giving the seller the contingent right to ship such grades as it had available and the acceptance being an absolute right upon the part of the seller to make such shipments.

[fol. 59] 6. Because the court erred in not sustaining the demurrer of the defendant to plaintiff's petition, defendant in said demurrer having contended, which contention the court overruled, that plaintiff could not sue on three counts: 1. That plaintiff had resold the sugar, the subject-matter of the contract, for the account of the defendant, 2. that plaintiff was entitled to recover the difference between the contract price and the market price of the sugar, and 3. that plaintiff had sold the sugar to defendant and was entitled to recover the contract price therefor less the amount received for the sugar sold by plaintiff; it being error in the court not to require plaintiff, in response to the demurrer, to elect to proceed on one and only one of the counts sued on.

7. Because the court erred in not requiring plaintiff to elect which one of the three statutory remedies under the laws of Georgia it would pursue, such remedies being: 1. for the difference between the contract price and the market price of the sugar at the time and place of delivery, 2. the difference between the resale price fixed by a sale made by the plaintiff as agent for the defendant and the market price, 3. the full contract price of the goods, plaintiff storing the property for defendant vendee.

8. Because the court erred in overruling an exception to its charge taken on the trial and before the jury had retired in which the exception was made to that part of the court's charge submitting all three counts to the jury. The matter was brought to the attention [fol. 60] of the court by counsel and the statement of counsel and the reply of the court are as follows:

Mr. Watkins: I desire to note an exception to the Court submitting all three counts to the jury. I think the Court should have selected a count and submitted it.

The Court: I do not care to correct that. You understand it is quite authorized that you may have separate counts. If you prove one, that may exclude the others, but if you do not prove one, you may fall back on the others.

9. Because the court erred in charging the jury as follows:

"You will simply apply your mind to the solution of the fact of whether a sale between the 30th of November and the 20th of December was a reasonable time."

such charge having been excepted to before the jury retired and an exception having been allowed, the charge being error in that under the contracts sued on delivery was to be made during September. It was therefore error of the court to submit to the jury November 30th as the date from which they would reckon a reasonable time for a resale.

10. Because the court erred in overruling the exception of the defendant as shown in proceedings had before the court before the jury retired, as follows:

Mr. Watkins: We except to the Court fixing November 30th as the time from which a reasonable time should be figured. I construe the plaintiff as being always in possession.

The Court: If you believe that the facts have established that [fol. 61] the sugar was delivered to the carrier and the contract called for that, that would be a delivery to the purchaser, and the right therefore of taking possession of it up until the time of payment would apply, and inasmuch as the only evidence in the case is November 30th, I charge you that is the date.

Because the court erred in submitting to the jury count one of the petition based upon a resale by the plaintiff when the undisputed evidence showed that prior to bringing this action, to wit on Septem-

ber 7, 1920, and on September 20, 1920, plaintiff elected to affirm the contract of sale, to store the sugar for the account of the defendant, and to recover the full amount of the contract price, such election in fact precluding plaintiff from taking advantage of any other statutory right.

12. Because the court erred in entering judgment for plaintiff on count one of the petition when the undisputed evidence showed that prior to bringing this suit plaintiff had elected to store the sugar for the account of defendant and to recover the full contract price thereof and plaintiff could not thereafter change its election and sue for the difference between the resale price and the contract price, the verdict of the jury having been placed on count one which claimed the difference between the resale and the contract prices.

13. Because the court erred in not permitting the witness J. E. Yates, a wholesale grocer of Macon, Georgia, to testify to his sales beginning September 1st, 1920, and continuing to September 30, 1920, and to testify that between said dates he sold sugar to retail grocers in and around Macon, Georgia, in quantities ranging from [fol. 62] one hundred pounds to one thousand pounds at prices September 1st, 1920, of nineteen cents per pound gradually decreasing from that date to September 30, 1920, when the price was sixteen cents per pound, said testimony having been offered, objected to, and the objections sustained by the trial court.

14. Because the court erred in not permitting the witness R. B. Small, a wholesale grocer of Macon, Georgia, to testify to his sales beginning September 1st, 1920, and continuing to September 30, 1920, and to testify that between said dates he sold sugar to retail grocers in and around Macon, Georgia, in quantities ranging from one hundred pounds to two thousand and thirty pounds, at prices September 1st, 1920, of nineteen cents per pound, gradually decreasing from that date to September 30, 1920, when the price was sixteen cents per pound, said testimony having been offered, objected to, and the objections sustained by the trial court.

15. Because the court erred in refusing to permit the witness R. B. Small to testify that he was in the wholesale grocery business in Macon, Georgia, an officer in the defendant corporation, had been in the business for more than ten years, was familiar with the method and prices of sugar, and that from December 1st to December 15th, 1920, he had sold sugar at prices ranging from nine and one-half cents to ten and two-tenths cents per pound in quantities ranging from one hundred to three hundred pounds.

16. Because the court in not admitting the testimony of J. E. Yates and in sustaining an objection to such testimony, which testimony was to the effect that wholesale grocers receive from one-[fol. 63] fourth to one-half cent per pound in excess of the cost to them in purchasing from the refiners and that the witness during the first fifteen days of December, 1920, had sold sugar at prices around nine to ten and two-tenths cents per pound.

17. Because the Court erred in not permitting the witnesses R. B. Small and J. E. Yates, wholesale grocers in Macon, Georgia, to testify as to prices obtained by them from sales of sugar to retail merchants and chain stores for the months of September, October, and November, 1920.

18. Because the Court erred in not permitting the witness W. E. Small to testify indicating market value and as affecting the question of the legality of the resales pleaded to sales of sugars and quotations equal to and greater and at prices higher than was obtained about the same time by plaintiff in making its sales.

By reason whereof, plaintiff in error prays that the judgment aforesaid may be reversed, etc.

Fred T. Saussy, MacAsbell, Horace Russell, Edgar Watkins,
Attorneys for Plaintiff in error, The A. B. Small Company.

[File endorsement omitted.]

[fols. 64 & 65] SUPERSEDEAS BOND FOR $7,000.00—Approved and filed May 5, 1923; omitted in printing

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[fol. 66] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA, WESTERN DIVISION

[Title omitted]

BILL OF EXCEPTIONS—Filed May 5, 1923

Be it remembered that on the trial of this case wherein The American Sugar Refining Company was Plaintiff and The A. B. Small Company was Defendant in this Court a petition was filed in said Court against defendant on August 29, 1921.

Thereafter defendant interposed its demurrer to said petition and filed its answer thereto. Thereafter plaintiff filed its demurrer to the answer of the defendant and there came on to be heard the demurrer of the plaintiff to the answer of defendant and the demurrer of defendant to the petition of the plaintiff; and after argument the Court entered its findings and order sustaining a portion of the special demurrer of the defendant, overruling defendant's general demurrer, and sustaining plaintiff's demurrer to the special answer of the defendant. To the rulings of the Court in sustaining the demurrer of the plaintiff to defendant's answer and in overruling demurrer of defendant to plaintiff's petition, The A. B. Small Company, defendant, then and there excepted, which exceptions were then allowed and are here and now sealed.

Thereafter at the October term 1922 of said Court, to wit on the [fol. 67] 7th day of March, A. D. 1923, Honorable William H. Barrett, Judge presiding, the following proceedings were had:

A jury having been duly and legally impaneled and sworn according to law, thereupon plaintiff, to sustain the issue on its part, introduced certain testimony. After the plaintiff had introduced its testimony defendant, to sustain the issue upon its part, introduced certain testimony. The evidence and all the evidence affecting the matters to which this bill of exceptions relates was as follows, to wit:

Plaintiff introduced a certain paper reading as follows, to wit: (See Exhibit "A" to original Petition.)

Plaintiff then introduced a paper dated July 22, 1920, the heading of which was just the same as that above and the only differ- [fol. 68] ence being that under the head of "Sacks" on the first line there appeared the figures "50," and under the head of "Kind Packages" on the first line there appeared the figures "25"; under the head of "Bags" on the second line there appeared the figures "41," and under the head of "Kind Packages" on the second line appeared the figures "100"; that on the third line under the head of "Barrels" there appeared the figures "24." All other parts of the offer dated July 22nd were the same as of the offer dated July 14. On the back of both the offer of July 14th and that of July 22nd there appeared the following:

"Barrels or equivalent at price of 22½ cents assortment to be furnished seller by buyer before September 1, 1920, but subject to such substitutions as seller may find necessary to make. In event assortment is not furnished prompt seller reserves right to ship such grades as it has available at time of shipment. Delivery to be made during September or as soon thereafter as possible; buyer will accept delivery when made by seller. Seller is to have option of making delivery from any of its refineries; all transportation charges to be for account of buyer. Subject to rules and regulations of any Government Department at time of shipment or delivery. United States Food Administration License Number G 14143."

The language above copied was typed on the respective offers, and the name "The A. B. Small Company" was signed at the bottom.

Plaintiff then offered in evidence the following paper claimed to be an acceptance of the offer of July 14, 1920:

[fol. 69] EXHIBIT IN EVIDENCE

Confirmation

Form 218 D. IOM.

The American Sugar Refining Company 132 N. Peters Street, New Orleans.

Buyer's No.: —. Allotment: ——. Date 7/14/22.

Terms: Cash, Less 2%—7 days.

Sold to The A. B. Small Co.; Address, Macon, Ga. Basis 22-50. Freight: ——. (F. O. B. New Orleans.) Delivery Carrier.

Ship to: —— ——; Address, ——.

Option of routing is reserved by seller.

(Seller's Ruling Freight Basis on date shipment.)

Delivery complete on receipt of goods by carrier. This purchase to be invoiced and paid for at contract price. No allowance will be made for decline in market. This contract contingent on strikes, accidents, fire or other delays beyond seller's control. All additional import duties, excise or other taxes hereafter levied on the raw or refined sugar necessary to fill this contract at buyer's expense in addition to price specified.

Sacks	Bags	Bbls.	Kind	Pkgs.	Grade
88	..	..	25	..	DG
..	45	..	..	..	FG
..	..	12	..	..	"

Seller reserves right to ship such grades as it has available at the time of shipment, delivery to be made during Sept. or as soon thereafter as possible and buyer will accept delivery when made by seller. Seller is to have option of making delivery from any of its refineries. All transportation charges to be for account of the buyer. Subject to rules and regulations of any Government Department at time of shipment or delivery.

Sold by E. W. Timmerman.

7/20/20.

Plaintiff then offered in evidence the following paper claimed to be an acceptance of the offer of July 22, 1920:

[fol. 70] EXHIBIT IN EVIDENCE

Confirmation

Same printed heading as in previous "Confirmation" except date 7/22/20 instead of 7/14/20.

Sacks	Bags	Bbls.	Kind	Pkgs.	Grade
50	..	..	..	25	DG
..	41	..	..	..	FG
..	..	24	..	..	"

Same reservation clauses as in previous confirmation.
Sold by E. W. Timmerman.
7/24/20.

To the offers to contract and the alleged confirmation slips defendant then and there objected on the ground, first, that the offer does not specify from whence the shipments are to come and specifies a price, or prices, of 22.99, 22.96, and 23.16. The acceptance or con- [fol. 71] firmation specifies a price of 22.50 f. o. b. New Orleans; there is nothing in the offerings to specify from whence the shipments are to come and the prices are different in the offers and the acceptances. The order says "subject to acceptance by American Sugar Refining Company." The third objection is that the terms of the acceptance differ from the terms of the order. I want to call attention to the fact that the order makes conditional the seller's right to make such shipments as they may desire. For those three reasons, the defendant objected to the introduction of the so-called confirmations, which objection was overruled by the Court, to which ruling the defendant then and there excepted, which exception was then and there allowed and is here and now sealed.

[fol. 72] CORRESPONDENCE

Letter dated August 7, 1920, addressed to Mr. E. W. Timmerman, from A. B. Small Company, reads:

"We return herewith American Sugar Refining Company invoice of July 25th which covers 50 bags of sugar tendered us a few days ago. We could not accept the sugar as we have not ordered any soft sugar from you. If you have offered us sugar, it has been our understanding all along that it was granulated. We have made several efforts to see you in reference to same, but so far have failed to see you. As above stated, we are returning invoice. If you have any other sugar for shipment to us, we would appreciate very kindly that you withhold shipment until we advise you further as you no doubt appreciate the fact that this market is glutted with sugar."

On August 19th, 1920, The A. B. Small Company wrote to American Sugar Refining Company:

"We wrote you about ten days ago requesting you to hold up further shipments of sugar on account of this market being overstocked and a great deal of distress sugar being in the market. We have received an invoice today for additional lot and will appreciate very much if you will carry out our instructions in the matter. Let us hear from you and oblige."

On August 23rd, 1920, The American Sugar Refining Company wrote to The A. B. Small Company as follows:

"We shall be very glad to comply with the request contained in your letter of the 19th, to with-hold shipment of your September contracts of which there are two, July 14th, 50 barrels and July 22nd, 50 barrels. We can make shipment of this any time during the month of September that seems most convenient to you, and will be glad to have you give us an approximate date on which it will be agreeable for shipment to go forward."

On the 7th of September, 1920, Mr. Small for The A. B. Small Company wired the American Sugar Refining Company:

"Shipment by you to us September third will be rejected."

On the same day Mr. Small wrote:

"We wrote your Macon, Georgia, representative, Mr. E. W. Timmerman, as per copy herewith attached, on August 7th, and we wrote you as per copy herewith attached on August 19th; both of these letters instructed you not to make any shipment to us, therefore very much to our surprise we received your invoice of September 3rd, which reached us this morning, and today we wired you as follows:

'Shipment by you to us September 3rd will be rejected.'

We regret very much that you do not observe our instructions in our letters of August 7th and August 19th."

On September 7th, in reply to that wire, the American Sugar Re-
[fol. 73] fining Company wired A. B. Small Company:

"Answering your telegram shipment third covered by your contracts July fourteenth and twenty-second fifty barrels each. Shall expect acceptance in accordance terms contract. Otherwise will have to store for your account."

On the 9th the American Sugar Refining Company wrote to Mr. Small:

"We acknowledge receipt of your letter of the 7th and regret exceedingly your request to delay shipment of your September con-

tract was overlooked, and in order to satisfactorily adjust this oversight, it will be agreeable for you to remit for this invoice as if dated on September 25th, which would be payable about October 5th, less the usual 2% discount. Trusting that this will be entirely satisfactory to you, we are, yours very truly American Sugar Refining Co."

On the 13th of September Mr. Small wrote the American Sugar Refining Company:

"We acknowledge yours of the 9th and regret that we are not in position to accept proposition named by you. For the good of whom it may concern, we would suggest that this carload of sugar be stored to save any additional cost against whoever might be affected."

On the 20th Mr. Greene, the sales manager of the American Sugar Refining Company, wrote:

"Replying to your telegram of September 7th, addressed to our New Orleans office, relative to 100 barrels of sugar on September contract, we must reiterate to you what was mentioned in telegram sent to you on the 7th from our New Orleans office, that unless this sugar is accepted by you upon its arrival at destination, it will be necessary to store same at your expense."

On October 15th, the American Sugar Refining Company wrote Mr. Small:

"We beg to call your attention to our invoice of September 3rd, for $8,074.74 which was endorsed on the invoice as being extended to September 25th and made payable October 5th. As we have not received check, we beg to call your attention to the matter."

On October 18th, Mr. Small wrote:

"We acknowledge receipt of yours of the 15th and in reply thereto will state that the invoice mentioned by you covers shipment that was rejected by us some time ago."

[fol. 74] On October 25th, the Assistant Superintendent of the American Sugar Refining Company wrote Mr. Small:

"We herewith attach storage and unloading bill dated September 3rd, order No. 8310-B, from September 20th to October 20th, amounting to $30.80 for sugar stored in Macon for your account." * * *

Attached to this letter is the bill for storage and for unloading charges.

On October 26th, Mr. Greene, the sales manager of the American Sugar Refining Company, wrote to Mr. Small:

"Replying to your letter of October 18th, addressed to our New Orleans office relative to invoice of September contract, we beg to refer you to our letters of August 9th, August 18th and August 30th,

in which we informed you that it would not be possible for us to cancel the order in question. We also beg to refer you to our letters of September 20th and 21st, in which we advised you that all storage charges in connection with this shipment would be for your account until you accept. We must insist that you accept this shipment and remit in full for invoice covering same."

On the 19th, the American Sugar Refining Company wrote to Mr. Small:

"We are advised by our Mr. C. H. White Jr. that you continue to refuse our shipment of September 3rd on the ground that you were unduly influenced to sign this contract. You no doubt realize that any prediction made by our salesmen as to the future price or scarcity of sugar represented merely his own personal opinion and was in no way legally binding upon this company, as your signed contract is legally binding upon you. At the time these contracts were offered you, on July 14 and 22, it was your privilege to accept or decline, as you saw fit, and according to the dictates of your own best business judgment. We hardly think that a firm of your experience would allow themselves to be influenced into signing a contract just because someone else told them to, if they did not feel it would accrue to their own advantage. The fact remains that we hold your signed orders covering this shipment of September 3rd. These contracts were entered into by us in good faith. Therefore, we must insist that you fulfill your obligations under these contracts with us by accepting without delay. We remind you that storage charges are accruing for your account until you accept."

On November 22nd, the A. B. Small Company wrote the American [fol. 75] Sugar Refining Company:

"We acknowledge yours of the 19th and same has been most carefully noted. We have had two conferences with Mr. White, both of which were at some length and have gone through all matters with him most thoroughly and also the contracts themselves. We regret that we are not in position to do other than as mentioned in our previous correspondence and as told your Mr. White."

On November 25th, the superintendent, Mr. White, wrote the A. B. Small Company:

"We enclose herewith bill in the sum of $25.80 which represents storage on sugar invoiced to you under our order 8310 C, which was refused upon arrival at destination and stored for your account. We wish to remind you that these goods are being held in storage for your account and as storage charges accrue we will render invoice to you and your account will be charged accordingly." * * *
Enclosed with that letter is the bill.

On November 30th, the general sales manager of the American Sugar Refining Company wrote to the Small Company:

"Replying to your letter of November 22, we are unable to understand your assumption that you can repudiate your obligations under contracts into which you have legally entered with us. We can only repeat that we hold your signed order covering our shipment of September 3rd, and must insist that you fulfill your obligations to us by accepting same. We remind you that storage charges are accumulating daily for your account until you accept."

On November 30th, the American Sugar Refining Company wired A. B. Small Company from New York:

"We have previously advised you that the shipment of 100 barrels sugar ordered by you and refused on arrival at destination has been placed in storage with Outz, Mitchell and Whaley, Macon, Ga. stop. As you have continued to refuse to take this shipment we must now inform you that unless you accept and pay for same at once we will resell this sugar for your account stop. When resale is made we will require you to remit the difference between contract price and price received on resale as well as for all freight storage and other charges incurred."

On February 9th, 1921, Mr. Small wrote the Refining Company:

"You are hereby notified that we do not acknowledge any liability whatsoever to you and that we owe you nothing on open account or otherwise."

[fol. 76] On March 24, the general sales manager of the American Sugar Refining Company wrote to the A. B. Small Company:

"We notified you on November 30th, 1920, that the 100 barrels of sugar ordered by you and refused on arrival at destination would be resold for your account unless accepted by you at once. As you continued to refuse this sugar, we have been obliged to resell the same. Pursuant to our notification sent to you prior to the resale of this sugar, we are invoicing you herewith for the difference between the contract price of this sugar and the price received on resale of same, as well as for freight, storage, and other charges incurred. We must insist that you remit the amount of this invoice promptly" * * *

Attached to that is the invoice showing the original price to be $8,074.74, demurrage $14.70, unloading $5.00, storage $77.40, making a total of $8,171.84. Then there follows a list of sales to various people, most of it in very small lots, the sales aggregating $3,060.14, leaving a balance due of $5,111.70. These sales were made beginning December 11, and the last one was made December 20th. There were sales on the 11th, 13th, 14th, 15th, 16th, 17th, 18th and 20th of December. The statement is the same as that attached as an exhibit to the petition and is not again copied.

On March 31, Mr. Small wrote the Refining Company:

"We acknowledge yours of recent date enclosing statement of what you claim we owe you, and in reply thereto beg to advise that we are not indebted to you in any sum whatever."

Then on April 5, 1921, the general sales manager wrote to A. B. Small Company:

"Replying to your letter of March 31, we beg to refer you to our letters of September 20, October 26, November 19 and November 30, in all of which we advised that it would not be possible for us to cancel your order covered by our shipment of September 3. In making shipment at this time, we were entirely within our rights under our contract with you for September delivery, and inasmuch as we notified you on November 30 that unless accepted at once we would resell this sugar for your account, we will now be obliged to hold you for the difference between contract and resale price, as well as for all freight, storage and other charges incurred."

Mr. Small replied to that letter on April 9th as follows:

[fol. 77] "We acknowledge receipt of yours of April 5th, and in reply beg to advise that we are not indebted to you in any sum and if you have any further communications to make to us regarding this matter, we refer you to our attorneys, Mr. Edgar Watkins of Watkins, Russell & Asbill, Atlanta, Ga. and Mr. F. T. Saussy of the firm of Saussy & Saussy, Savannah, Ga."

C. T. SEITER sworn for plaintiff:

Direct examination.

Mr. Park:

I am connected with the American Sugar Refining Company and have been with one year intervening for seven years. I was in Macon during the fall of 1920. As the representative of the American Sugar Refining Company I made the sales of the A. B. Small Company sugar shown on the statement dated March 24, 1921, already in evidence, and the amounts shown there are correct. This sugar was shipped from New Orleans and stored at Outz, Mitchell & Whaley's in Macon, Georgia, and delivered to purchasers from there. I was familiar with the general condition in the sugar market in the summer and fall of 1920 and the market condition at that time was greatly demoralized, there was no market around the time of these resales. During the months of October and November until December, there was no demand for sugar. The market was declining. I made a great many small sales there because buyers didn't want to buy any more than their daily requirements. That was the general condition of the market. That was the condition that existed during the entire time after I came here. The American Sugar Refining Company has several different refineries, I think seven, located in different cities Its principal competitor is the Savannah Sugar Refining Corporation, located at Savannah or Port Wentworth. That company does a large business in this territory in a competitive way. There were considerable amounts of rejected

sugars and second hands being sold during the period after I came [fol. 78] to Macon. The effect that had on the sugar market was demoralizing and created no demand. If any considerable amount of this rejected sugar had been forced on the market at one time the effect would have been the dropping of the prices.

I am familiar with Willette & Gray's Journal and it is regarded as a standard publication in the sugar trade. At the time I sold this sugar in the market here I got the market price, that is the price that is shown by Willett & Gray's tabulated figures. These figures for 1920 are:

Fine Granulated Sugar Fluctuations

Quotations F. O. B. New York for Sugar in Barrels or 100 lb. Bags, Net Cash

1920

		Cents per pound
Jan.	2	Nominal.
Feb.	1	Nominal.
Mar.	1	Nominal.
Apr.	1	Nominal.
May	1	Nominal.
June	1	Nominal.
July	1	Nominal.
Aug.	1	Nominal.
Aug.	12	16.758
	23	16.66
	31	15.68
Sept.	2	14.70
	15	14.455
	16	14.21
	22	13.965
	27	13.72
	29	13.23
	30	12.74
Oct.	4	12.25
	5	11.76
	6	11.27
	7	10.78
Nov.	1	10.29
	15	9.80
	16	9.555
	18	9.31
	19	8.82
	23	8.575
Dec.	13	8.085
	16	7.840
	17	7.742
	31	7.742

The price of sugar is based on fine granulated—barrels of fine granulated. The net weight per barrel is 350 pounds. When we say basis price is $22.50 what we mean is basis 22.50 New Orleans on barrels of sugar or equivalent to barrels. If the customer gives us [fol. 79] an assortment specifying other kinds of packages, there is a well understood published differential, known in the trades. There is a difference in packing the sugar in small bags and that packed in barrels; according to the number of bags there would be an increase or decrease. That is true as to grades—soft sugar for instance would be below the basis and there are some that are above. Those differentiations on grades are well understood and are recognized in the trade. I was instructed to sell this A. B. Small sugar to the best of my knowledge, around December 7th—the 7th or 9th, and the first sale was made on the 11th. I immediately got busy on it.

Cross-examination.

By Mr. Watkins:

I first learned that this sugar involved in this case was in Macon when I arrived here. I didn't know anything about it until I arrived here. I arrived here about the first of November and about December 7th or 9th I was directed to dispose of this sugar. Prior to that I had taken no action with reference to the sugar. These [fol. 80] parties to whom these sales were made live in and around Macon. After December 7th and 9th I went around in person and sent out circulars to those out of town. I either called in person or got a letter from them and that's the extent of the efforts I made. Of the men to whom sales were made, some are not wholesale grocers, some are retail grocers,—L. W. Rogers Company is a retailer, and so are the Great Atlantic & Pacific Tea Company and C. D. Kenny Company. The quantities were just such quantity as I could get them to take. I sold them as little as 100 pounds and one sale was as high as 3,400 pounds. I didn't commence trying to sell this sugar prior to December 7th because I wasn't directed to. I did know when I first came here in November that this sugar was here. I found it out from Outz, Mitchell & Whaley. I do not recall getting any notice from our company until about December 7th or 9th. Mr. White brought me here in November and he told me it was here. Sugar was falling rapidly from November to December. I had other sugar here I was selling. I commenced selling resale sugar December 2nd which was the first sugar I resold. I resold on this market while I was here, disposed of on this market during the time I was here I would say about 500 barrels. I commenced on the other fellows' before I commenced on Small's because the others were smaller lots. I was not directed to sell the Small sugar until the 9th of December. I was directed to put it on resale at that time—at the same time—but some of the other lots were smaller. I said that the first time I got orders to sell the Small sugar was December 7th; I sold some other resale sugar on December 2nd;

the first sale was December 2nd; I must have gotten the authority around the latter part of the month. I wish to change my testimony to that extent. I must have gotten the authority in November or about December 1st. The authority was verbal. I sold from [fol. 81] December 1st to December 10th sugar to an amount not over 100 barrels. When I was here during November I did not sell any sugar; I came here about the first of November and this resale of sugar started in December. In November I was principally getting acquainted. I don't recall that I tried to sell any sugar at all. I don't know that I did sell sugar for the refining company in November. I think I just sat down here and did nothing except just get acquainted. If I had sold the sugar in November at the prevailing prices, I would have gotten a higher price.

The November prices showed November 1 at 10.29 and they go down to 8.57. I could have sold this early in November and if I had done so you would have gotten a much higher price if I could have gotten the prevailing price. I was in competition in selling this with wholesale grocers in Atlanta who were selling Rogers and others. There were wholesalers who were selling the same trade I was. They were getting the market prices that I stated here to be the market prices. I sold as low as 100 pounds. That is accounted for in this way; it is caused in cleaning up the sale of a certain lot; that order might have been for five bags and I might have delivered four from one lot and one from that lot. I don't recall whether or not we shipped any sugar into Macon from either of our refineries in November or up to the 10th of December. This sugar delivered in 36 barrels in wood, 86 bags of bulk granulated and 138 four 25's.

The Court:

Q. You spoke of a published differential between sugar in barrels and sugar in small packages, do you know what those are?

A. I can call most of them.

Q. Do you know whether or not the prices that are placed opposite the domino and other sugars that are mentioned is according to the [fol. 82] published differential between that and 22.50 sugar?

A. Yes sir.

[fol. 83] O. H. LAMBORN, sworn for plaintiff, examined by Mr. Park, testified:

"I am familiar with the conditions that prevailed in the sugar trade during the summer and fall of 1920. The market had been advancing since the early part of the year until June and July; in July it steadied somewhat and did not continue its advance and then in the early part of August began to decline and continued its decline until the end of the year. The decline after that time was somewhat slow at first, but as the season progressed it was more rapid until the latter part of October there was a slight improvement in the market, but that was only temporary and it began to decline again after that time. The market reached its highest point in June, and

the prices refiners were quoting—the highest I know of—was 26 cents for sugar, but it was supposed to have sold at even higher prices than that. It went down to about 8 cents a pound I believe, towards the end of the year. There was a gradual decline then from early in August until the latter part of December from 26 cents or about that, down to about 8 cents.

"There was practically no demand during the summer months—during August, September and October—because practically all the trade was supplied with sugar they had bought in the spring and early summer, but about November and December the situation was somewhat improved, although not a great deal, because some of the old stocks were being cleaned up. It was not feasible to put on the market any considerable amount of sugar during the latter part of August, September and October.

"I have been in the sugar business for the past twelve years and have kept in close touch with the conditions and market prices—[fol. 84] the raw sugar prices and the prices made by refiners—but I have with me the Willett & Gray's Weekly Statistical Journal which is recognized internationally as authority on sugar prices and I can testify from this publication as to the market price on September 30th.

"There is no exchange or any source for getting sugar quotations in Savannah. The freight rate from New York to Savannah is approximately 16 cents per hundred pounds as compared with five cents per hundred which the Savannah Sugar Refinery charges the Savannah jobbers for delivery from the refinery to Savannah, making a difference of 11 cents per hundred pounds. The price in New York and Savannah practically are the same with the exception of the freight. I was familiar with the prices in Savannah during 1920. From my knowledge of those prices and by refreshing my recollection by reference to the Willett & Gray quotations, the market value of sugar in Savannah on September 30th was 12.74 cents per pound.

"I have before me the publication of October 2, 1920, issued by a journal named 'Facts About Sugar,' which is an independent publication. It is recognized in the sugar trade. The price shown in that for September 30th is 13 cents less 2% for cash.

"As to Willett & Gray's quotation on October 1st as of September 30th, they have under refined sugar heading this: Federal's price of 13 cents is the lowest refiner's basis, but sugars from second hand can be obtained at the same quotation. Arbuckle and Howell continue to quote 14 cents but we understand that the former is quietly meeting competition.

"Second hands are the same quality of sugar, but are sugars that have been purchased by a wholesale grocer who finds himself overstocked or something and desires to sell them, and they are simply [fol. 85] termed in the trade second hands, but that does not mean they are of an inferior grade.

"These sugars of Mr. Small that were resold would be termed second hands, although it was in the original packages and just like it left New Orleans."

JOHN G. RUAN sworn for plaintiff:

Direct examination.

Mr. Park:

"I am a member of the firm of Ruan & Company doing business in Macon. We have a brokerage business and among other lines sell sugar. That was true in 1920. At that time I represented as broker Lamborn & Company and the Savannah Sugar Refining Company. During that year, particularly beginning with August and running through September and October, the condition of the sugar market was that wholesale grocers had taken in high priced sugar, they had big stocks and there was no demand. It was very hard to sell sugar. There was not sufficient demand for sugar during the month of September and the early part of October. The amount that was bought was ordinarily just hand to mouth buying; a man only bought what he actually needed for a short period because the price was going down. That condition existed during the month of October as well as during September."

JOHN G. RUAN, further testifying for plaintiff, direct examination by Mr. Park, said:

"I am familiar with Willett & Gray's quotations. They are regarded as high authority in sugar. The prices quoted in Willett & Gray's Journal are regarded as standard prices. There is very little difference between the quotations made by Willett & Gray from New [fol. 86] York and the prices obtained in Savannah, where the Savannah Sugar Refinery is located. There is sometimes a variation of ten points; ordinarily the New York refiners will name a price and Savannah meets it in a day or two. The New York price is regarded as the ruling or controlling price. There is no difference in standard fine granulated sugar. The sugar made by the American and put up under the Domino Brand and the Savannah sugar called Dixie Crystal is all the same. Standard fine granulated sugar is identical, practically so."

The plaintiff closed its testimony at this point. Defendant then presented J. E. YATES, who testified on direct examination by Mr. Watkins as follows:

"I live in Macon, Georgia, and I am in the wholesale grocery business and was in the wholesale grocery business in August and September, 1920. In my business I sold sugar, and have been selling sugar for about eighteen years, and am still engaged in the business."

Counsel for the defendant then asked the witness questions as follows:

Q. From your business of selling sugar in Macon in 1920, do you know what the market price of sugar sold by wholesale grocers was in September, 1920?

To this question plaintiff's attorney, Mr. Park, objected as follows:

"I object to the testimony as to what sugar was sold for in Macon by wholesale grocers. This is a question of refiner's prices at the refinery and not what wholesalers may have sold for in another and entirely different market."

The Court then questioned the witness who stated that he was familiar with sugar sold by wholesale grocers and knew the market price of such sales in Macon in September, and December, 1920. In [fol. 87] answer to questions from the Court the witness stated that in former times the wholesalers in Macon sold at from one-fourth to one-half a cent per pound above the price they paid the refiners, that from August to December, 1920, the market was in a very unsettled condition and normal differences could not always be obtained.

The witness said:

"After the market broke in August and September, I got the best price I could regardless of cost."

With the testimony in this form the Court sustained the objection saying:

"I think it is the duty of the Court, unless there can be some connection, to tell them to reject it and if I am going to tell them that, then why admit it."

Had the witness been permitted to testify in answer to the question he would have testified that the prices in August ranged from 22 cents down to 19 cents per pound for sugar, that the prices in September began at 19 cents and ranged down to about 16 cents by the last of September.

To the ruling of the Court in refusing to permit the witness to testify his opinion as to the reasonable market price of sugar in Macon, Georgia, in August, September, October, November, and December, 1920, the defendant then and there excepted, which exception was allowed, and *nere* now excepts, and the same is allowed and ordered sealed.

The same witness was then asked to state the sales made by him of sugar in September, 1920. The Court ruled that these sales were not admissible and declined to permit the witness to testify to the sales.

The witness, if permitted to testify, would have testified that he [fol. 88] made sales as follows:

"Beginning on September 1st, 1920, a sale of 100 pounds of sugar at a price of 19c., per pound and thereafter sales during the month of September at prices ranging from 20c. to 15.75c. per pound and in amounts as high as 1,000 pounds, the latter amount being sold on

September 28th, at 15.75c., per pound; the last sale in September being on the 30th, and was 100 pounds at 16c. per pound."

[fol. 89] To the ruling of the court in refusing to permit the witness J. E. Yates to testify defendant then and there excepted, which exception was allowed, and here now excepts which exception is allowed and ordered sealed.

R. B. SMALL was then offered as a witness as to his opinion of the market value of sugar in Macon in August, September, October, November, and December, 1920, and the same ruling was made and the same exceptions had as to the witness J. E. Yates.

To the ruling of the Court in refusing to permit R. B. Small to testify, as set out under the circumstances shown in the exceptions with reference to J. E. Yates, the defendant then and there excepted, and here now excepts, which exceptions are allowed and ordered sealed.

The witness R. B. Small was then asked to testify as to sales made by him in September, 1920. Objection was made that the sales did not indicate market price and the court sustained the objection.

The witness, if permitted to testify, would have testified of sales as follows:

"Beginning on September 1, 1920 a sale of 100 pounds of sugar at a price of 19c. per pound and thereafter sales during the month of September at prices ranging from 20c. to 15½c. per pound and in amounts as high as 2,030 pounds, the latter amount being sold on September 28th at 15½c. per pound; the last sale in September was on the 29th, being a sale of 100 pounds at a price of 16c. per pound."

[fol. 90] To the ruling of the court in refusing to permit such a hearing of the statements showing the market value, the testimony of R. B. Small showing his sales in September, 1920, defendant then and there excepted, which exception was allowed, and here now excepts, which exception is sealed, and this defendant assigns the ruling of the Court as error.

W. E. SMALL was then offered as a witness, and was asked as to sales made by him of sugar in September and October, 1920. The witness testified that he was not personally in the sugar business; that he had bought some sugar and resold it, some to manufacturers, some to wholesalers, and some to retailers; that he sold it to whomsoever he could, at the best prices obtainable; that the prices received by him in September ranged from 19¢ at the first of the month to 16¢ at the latter part of the month, and his sales in October ranged from 15¢ at the first part of the month to 12¢ at the latter part of the month; that he sold in amounts ranging from one thousand pounds to seventy thousand pounds.

Upon objection being made to the testimony that it did not show market value applicable in this case, the Court ruled that only sales

[fol. 91] by refiners could be admitted, and sustained the objection to the testimony of W. E. Small.

To the ruling of the Court in sustaining such objection, defendant then and there excepted, and here now excepts, which exception was then allowed and here now allowed and ordered sealed.

As illustrating the exception the following occurred:

The Court: Was that 70,000 pounds in one sale?

Mr. Watkins: Yes.

The Court: I understand the same rule would apply because he would be selling as a wholesaler.

[fol. 92] R. B. SMALL, recalled, testifying for defendant, said:

"I am President of The A. B. Small Company, and that Company was selling sugar in November, 1920, sales being mostly to retail merchants. Sales were also made during October, November, and December of 1920."

The witness then offered to testify that The A. B. Small Company in Macon sold during the months of October, November, and December sugar to retail grocers, chain stores, including the Atlantic & Pacific Tea Company, Kenny & Company, and L. W. Rogers Company, at prices beginning the first of October of sixteen cents per pound and gradually at lower prices 'till the 9th of December, when sales were made at 10.20 cents per pound. When this evidence was offered the jury retired and the witness was examined under the direction of the Court as follows:

Mr. Watkins:

Q. Was the A. B. Small Company selling sugar in Macon in December, 1920?

A. Yes.

Q. To what classes of trade?

A. Retail merchants and the trade generally.

Q. Did you sell Kenny and the Atlantic & Pacific Tea Company?

A. We have sold Kenny and occasionally sold the Atlantic & Pacific Tea Company and Rogers stores. * * *

* * * * * * *

The Court:

Q. Mr. Small, what, if any, established relation was there in normal times between the sale made to retailer and a sale made to a wholesaler, and by a wholesaler meaning such extensive retailers as Rogers and Atlantic & Pacific?

A. In normal times we would make from 25 to 40 points from the cost to the wholesaler to the selling price to the retailer.

[fol. 93] Q. What relationship existed in December, 1920?

A. The majority of jobbers had sugar on hand and they didn't

turn down an order for a quarter of a cent or even a half cent difference from their regular price.

Q. What if any relationship was there during that time between the prices that were made in selling to retailers and the prices made in selling to wholesalers?

A. At that time we were not buying any sugar and I was not posted on the prices of the refiner to the wholesaler.

Q. Do you know what were the prices in sales to the wholesalers?

A. No sir.

Q. Then this sale of 100 pounds to a retailer does not necessarily reflect the fair price that would be obtained in selling to wholesalers during 1920?

A. I can't answer that; as I say, I don't know what the cost to the wholesaler was at that time.

Q. And these prices to retailers would not indicate it?

A. We were selling sugar to the retail merchants in competition with wholesalers in the city of Macon. If those wholesale grocers were buying sugar at market prices from the refiners, we were meeting competition when we sold.

Q. But you were not meeting competition of refiners in selling to wholesalers?

A. Oh yes——

Q. Catch the question; you were selling to retail merchants, but that did not put you in competition with those who sold only to wholesalers, did it?

A. Only to the extent that the wholesalers resold; we couldn't go to Mr. Flournoy or Rogers or Jones and get more for sugar than the Macon Grocery Company could get.

Q. You couldn't sell to them for higher than the refiners' price, could you?

[fol. 94] A. The retailers couldn't buy from the refiners.

Q. Jaques & Tinsley could and the Atlantic & Pacific could—you couldn't sell to them for higher prices than the refiners were getting?

A. No sir.

Q. You have no record of selling to any of that class?

A. No sir.

Q. You know nothing about it yourself—of selling to that class?

A. No sir.

Mr. Watkins:

Q. As I understand you, while you were not buying from refiners at that time, you had to sell to the retail trade in competition with other wholesalers who were buying from the refiners?

A. Yes.

Q. And the general custom was one-quarter to a half of a cent profit over the price of the refiners?

A. Yes.

Q. Your price was fixed by the price of the wholesaler who bought from the refiner?

A. Yes; I can't control my prices; my competition controls my prices.

Q. You were selling in competition with wholesalers who had on hand a lot of sugar?

A. I don't know; we always competed with wholesalers.

Q. You were selling as far as you know in competition with wholesalers who were not apparently buying from the refiners but who had stocks of sugar on hand?

A. I don't know whether they were buying or not; I don't know whether they had distress sugar or sugar that was costing them more money or whether they were buying it in the open market. I do know in selling to the retail merchants, we had to meet the price the other wholesalers were making.

[fol. 95] Q. You know *what* refiners sell to wholesalers and do not sell to retailers?

A. That's the custom.

After such examination the Court stated that he would limit the testimony to December, and the following occurred:

The Court: Come to December—just limit it to December.

Mr. Watkins: Your honor rules out the market price obtained by wholesalers in October, November and December?

The Court: Evidence prior to September 30, would not be competent in my opinion. I think the evidence as to market prices obtained by wholesalers in the early part of October or in part of October and November—I think that is not competent.

Mr. Watkins: Does that exclude also September 30th?

The Court: I think wholesale grocers' prices would not be competent evidence, under the evidence given yesterday, which I understand is part of the evidence in this case. You may consider the question asked and your exceptions noted to the over-ruling.

To this ruling of the Court in declining to receive testimony of sales made by The A. B. Small Company in Macon, Georgia, in October and November, 1920, the defendant then and there excepted, which exceptions were allowed, and defendant here and now renews the exceptions, which exception is allowed and sealed.

The witness R. B. Small also proposed to testify that he made sales of sugar from December 1st in the same way that he had made sales prior thereto at prices ranging from 9½ cents to 10.2 cents, which testimony the Court ruled was inadmissible, and to which [fol. 96] ruling defendant then and there excepted, which exception was allowed and which exception is here now repeated, and which exception is allowed and ordered sealed.

J. E. Yates, then sworn on behalf of defendant, further testified:

Mr. Watkins:

Q. Were you in the wholesale business in Macon in December, 1920?

A. I was.

Q. Were you selling sugar at that time?
A. Yes.
Q. Are you acquainted with the method of fixing prices by wholesale grocers in Macon at that time?
A. We usually sell sugar based on a price of 9 to 10 cents at 25 to 50 cents per hundred pounds profit—four or five per cent profit.
Q. Do you know whether or not any wholesale grocers in Macon from December 5, to December 20, 1920, were buying sugar from the refiners?
A. Well not personally, I don't know.
Q. Do you know anything about what the market price of sugar was in December from December 5 to December 20th—the market of the wholesale grocer to the retail grocer?

Mr. Park: We object to that——
The Court: That has been ruled out.

Q. How much over the prices that were quoted to you at that time did you sell for?
[fol. 97] A. From 25 to 50 cents per hundred pounds.
Q. At what price were you selling in December?
A. I couldn't find my records of December; we moved in November of last year; I suppose they are there but I couldn't locate them.
Q. Were your prices similar to Mr. Small's?
A. There can't be much variation in sugar prices for the margin of profit is very small; from 25 to 50 cents a hundred is all we are able to get when it is ranging from six to ten cents a pound.
Q. If Mr. Small was selling from 9 cents to 10.20 cents what would you be selling at?
A. Around that same price.

Mr. Park: I think all of this testimony comes within the same rule as the other and I move to exclude it all.

The Court:

Q. Did you have any sugar on hand the first of December that you bought at high prices?
A. I don't remember whether we had sold out our high priced sugar or not; I know we had quite a little sugar.
Q. You don't know when you closed out your high priced sugar?
A. No sir.
Q. If you had any high priced sugar at that time, you were not selling it to retailers at 5% over the cost?
A. Not if it was bought on the high prices.
Q. You were selling it at what you could get for it?
A. We followed the market down; we based our price on what we could replace it for; sometimes we cut below the market if we want to get from under and think it is going lower.
[fol. 98] Q. You didn't sell it for the highest price you could get in order to save your losses?
A. Yes, we usually get all we can get.
Q. That's a natural action, isn't it?

A. Yes sir.
Q. You really don't know, as I understand your testimony, that you bought any sugar from the refiners during December of 1920?
A. No, I do not.
Q. Therefore, you do not know whether this price you were then getting represented a five per cent over-plus over the then current refiner's prices either for first hand or second hand sugars?
A. No sir, I do not.

The Court: Of course his testimony is nothing, and it is ruled out.

The witness, if permitted to testify further, would have testified that he sold sugar in the early part of December, 1920, at prices ranging from 9 to 10.2 cents per pound. To the ruling of the court in sustaining an objection to said testimony and in refusing to admit said testimony, defendant then and there objected, and when the objection was overruled excepted to the ruling of the court, and said exception was then allowed, to which ruling defendant now again excepts, which exception is allowed and ordered sealed.
[fol. 99] Defendant having no further testimony which under the rule of the Court was admissible, the cause was then argued, and the Court charged the jury. In the charge the Court submitted to the Jury all the three counts in the petition.
After completing his charge and before the jury had retired exceptions to the charge were made as follows:

Mr. Watkins: I desire to note an exception to the Court submitting all three counts to the jury. I think the Court should have selected a count and submitted it.
The Court: I do not care to correct that. You understand it is quite authorized that you may have separate counts. If you prove one, that may exclude the others, but if you do not prove one, you may fall back on the others.
Mr. Watkins: We except to the Court fixing November 30th as the time from which a reasonable time should be figured. I construe the plaintiff as being always in possession.
The Court: If you believe that the facts have established that the sugar was delivered to the carrier and the contract called for that, that would be a delivery to the purchaser, and the right therefore of taking possession of it up until the time of payment would apply, and inasmuch as the only evidence in the case is November 30th, I charge you that is the date.

To the part of the charge of the court submitting to the jury all three counts in plaintiff's petition, and before the jury had retired to consider its verdict, the defendant excepted, which exception was [fol. 100] then allowed and is here now repeated and ordered sealed.
To the court's charge fixing November 30th, 1920, as the date from which a reasonable time to make a resale should be considered the defendant excepted prior to the time the jury retired to consider of their verdict, which exception was allowed and is here now allowed and ordered sealed.

On the 7th day of May, 1923, an order was entered extending the time sixty days to prepare, approve, and settle the bill of exceptions. Said October term, 1923, of said Court has not yet adjourned, and said sixty days has not run, and within said term and within the time of the order, and in furtherance of justice that right may be done, the defendant, The A. B. Small Company, presents the foregoing as its Bill of Exceptions in this case, and prays that same may be certified and allowed, signed and served as provided by law.

Fred T. Saussy, Savannah, Ga., Mac Asbill, Horace Russell, Edgar Watkins, Watkins, Russell & Asbill, Atlanta Trust Building, Atlanta, Georgia, Attorneys for The A. B. Small Co.

[fol. 101] IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

The foregoing Bill of Exceptions is correct in all respects and is hereby approved, allowed, and sealed, and made a part of the record herein in open court, this 4 day of May, 1923.

Wm. H. Barrett, U. S. Judge.

On the part of the plaintiff it is hereby agreed that the foregoing Bill of Exceptions is correct in all respects, presents that part of the testimony which is necessary to a clear understanding of the issues raised, and service of copy thereof is acknowledged, and that said bill of exceptions may be approved, allowed, and settled this 4th, day of May, 1923.

Orville A. Park, Attorneys for Plaintiff, American Sugar Refining Company.

[File endorsement omitted.]

[fol. 102] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING WRIT OF ERROR, ETC.—Filed May 5, 1923

This 4 day of April, 1923, comes the defendant by his Attorney and files herein and presents to the Court his petition praying for the allowance of a Writ of Error and an Assignment of Errors intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the Court does allow the Writ of Error upon the execution of a bond by The A. B. Small Company, as Principal and R. B. Small and W. E. Small, as Sureties, payable

to The American Sugar Refining Company in the sum of Seven Thousand Dollars ($7,000.00) (*$7,000.00*) *dollars,* such bond when approved to operate as a supersedeas.

This 4 day of April, 1923.

Wm. H. Barrett, Judge United States Distrit Court, Southern District of Georgia.

[File endorsement omitted.]

[fol. 103] WRIT OF ERROR—Filed May 5, 1923

[Title omitted]

The President of the United States of America to the Honorable the Judge of the United States District Court for the Southern District of Georgia, Western Division:

Because in the record and proceedings, as also in the rendition of the verdict and judgment between The A. B. Small Company, plaintiff in error, and The American Sugar Refining Company, defendant in error, wherein the constitutionality of a law of the United States was drawn in question, and wherein it was contended that said law supported the pleadings of the plaintiff in error and relieved it of liability and the decision was against the rights especially set up and claimed under said law; manifest error hath happened to the great damage of the said A. B. Small Company as by its complaint appears. We being willing that error if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein good, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concern-[fol. 104] ing the same to the Supreme Court of the United States, together with this writ, so that you have same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 4 day of May in the Year of our Lord One Thousand Nine Hundred and Twenty-three.

Lenoir M. Erwin, Clerk United States District Court, Southern District of Georgia, by Cecil Morgan, Deputy. [Seal of the U. S. District Court, So. Dist. of Georgia, West'n Div.]

Writ of Error granted this 4 day of May, 1923, and supersedeas bond fixed at $7,000.00.

Wm. H. Barrett, Judge United States District Court, Southern District of Georgia.

[File endorsement omitted.]

[fol. 105] CITATION—Filed May 5, 1923; omitted in printing

[fol. 106] Due and legal service of the foregoing citation, the Petition for Writ of Error, the Assignment of Errors, the Writ of Error, and all other and further proceedings connected with the Writ of Error from the United States District Court for the Southern District of Georgia to the Supreme Court of the United States acknowledged, and all other and further service and notice of any kind or character whatsoever waived.

This 4 day of May, 1923.

Orville A. Park, Attorney for Defendant in Error.

[File endorsement omitted.]

[fol. 107] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA

[Title omitted]

PRÆCIPE FOR RECORD—Filed May 5, 1923

To the Clerk of said Court:

The A. B. Small Company, plaintiff in error, directs you to forward to the Supreme Court of the United States with the Writ of Error the parts of the record which it thinks necessary for the consideration of the errors assigned:

1. The Petition of Defendant in Error.

2. The Demurrer of Plaintiff in Error to the Petition.

3. The Answer of Plaintiff in Error.

4. The Demurrer of Defendant in Error to the Answer of Plaintiff in Error.

5. The Amendment of its Petition by Defendant in Error.

6. The Judgment of the Court Overruling Plaintiff in Error's Demurrers and sustaining Defendant in Error's Demurrers to Plaintiff in Error's Answer.

6 A. Charge of the Court.

7. The Verdict and Judgment rendered herein.

8. Petition for Writ of Error.

9. Assignment of Errors.

10. Bond.

11. Bill of Exceptions.

[fol. 108] 12. Order Allowing Writ of Error.

13. Writ of Error.

14. Citation in Error and Acceptance of Service Thereon.

15. This Designation of parts of the Record with Service Thereon.

16. Clerk's Certificate.

This 4 day of May, 1923.

Mac Asbell, Horace Russell, Edgar Watkins, Attorneys for The A. B. Small Company, Plaintiff in Error.

Service and copy of the above and foregoing designation of the Record, accepted, and all other or further notice or any service waived, and it is agreed that said designation states all the facts of the Record that is necessary to a clear understanding of the Error complained of.

This 4 day of May, 1923.

Orville A. Park, Attorneys for Defendant in Error.

[File endorsement omitted.]

[fol. 109] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA, WESTERN DIVISION

[Title omitted]

ORDER EXTENDING TIME TO FORWARD TRANSCRIPT ON APPEAL—Filed May 29, 1923

For satisfactory reasons appearing to the Court, the time for filing the record in this cause in the United States Supreme Court, pursuant to the writ of error sued out, is extended until the fifth day of July, 1923.

This May 24, 1923.

Wm. H. Barrett, Judge United States District Court.

[File endorsement omitted.]

[fol. 110] UNITED STATES OF AMERICA,
Southern District of Georgia, ss:

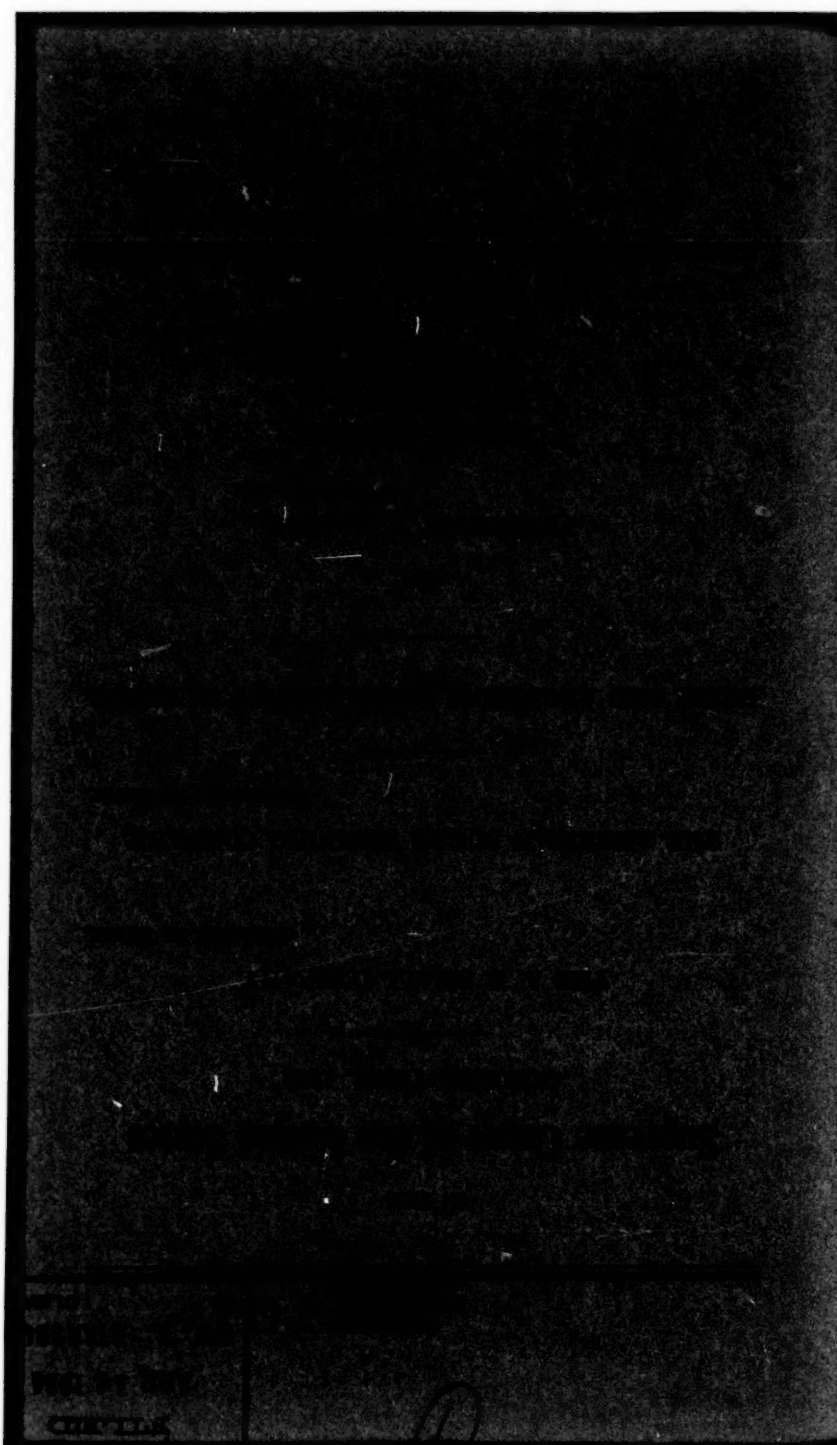
CLERK'S CERTIFICATE

I, Lenoir M. Erwin, Clerk of the District Court of the United States for the Southern District of Georgia, do hereby certify that the foregoing contains a true and correct copy of the record, bill of exceptions, assignment of errors and all other proceedings in the

cause lately pending in said Court, as the same appears of record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Court at Macon, in said Division and District, this 9th day of June, A. D. 1923.

Lenoir M. Erwin, Clerk, by Cecil Morgan, Deputy. [Seal of the U. S. District Court, So. Dist. of Georgia, West'n Div.]



SUBJECT INDEX.

PART THREE.

PART FOUR.

LIST OF CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

THE A. B. SMALL COMPANY, Plaintiff in Error, v. THE AMERICAN SUGAR REFINING COMPANY, Defendant in Error.	No. 400

PRELIMINARY. JURISDICTION.

The A. B. Small Company, plaintiff in error here, defendant below, filed its answer setting up as a defense the Lever Act and the regulations of the President based thereupon. The American Sugar Refining Company, defendant in error here, plaintiff below, demurred to this paragraph of the answer on the ground that the Lever Act was unconstitutional and void, which demurrer was sustained and the pleas stricken. The ruling on the demurrers presenting an issue as to the constitutionality of a law of the United States, this writ of error was taken direct from the United States District Court to the Supreme Court under the authority of Section 238 of the Judicial Code.

PART ONE.

GENERAL STATEMENT OF THE CASE.

(A) THE PETITION.

The American Sugar Refining Company, hereinafter called the "Seller", filed its complaint in the United States District Court for the Southern District of Georgia, Western Division, alleging the sale of certain sugar under written contracts to the A. B. Small Company, hereinafter called the "Buyer", that the Buyer refused to accept and pay for the sugar under the contracts and that the Seller had been damaged thereby.

(B) DEMURRER.

A general demurrer to the complaint was filed on behalf of the Buyer based on the claim that the pleaded offers and acceptances attached to the complaint did not amount to contracts, which demurrer was overruled.

(C) ANSWER.

An answer was filed which denied that any contracts ever existed between the parties for the sugar involved in the suit and that if any contracts ever arose the Seller could not recover from the Buyer more than one cent per pound profit on what the sugar actually cost it, this being the prima facie reasonable profit fixed by the President of the United States in administering the Lever Act.

(D) DEMURRER TO ANSWER.

The Seller demurred to so much of the answer as relied upon the Lever Act as a defense upon the ground that said Act was unconstitutional and void and said demurrer was sustained and the pleas stricken.

(E) TRIAL, VERDICT AND JUDGMENT.

At the trial the jury returned a verdict for the Seller upon which the court entered judgment (rec. 32). The Court having held in sustaining the Seller's demurrer to the Buyer's answer that the pleas based upon the Lever Act should be stricken because said Act was unconstitutional and void, this appeal was taken direct from the District Court to this Court.

(F) FACTS ESTABLISHED.

The Buyer executed the orders attached as Exhibits A and B to the petition (rec. 7, 8) and the Seller signed two confirmations in the form shown by Exhibit C to the petition (rec. 9). The offers and the acceptances differed in important respects, among others in that the offers were "subject to acceptance by American Sugar Refining Company", whereas the acceptances are silent in this respect, and the offers after specifying particular brands of sugar, to wit: Domino granulated and fine granulated, contained a clause, "In event assortment is not furnished prompt Seller reserves the right to ship such grades as it has available at the date of shipment"; whereas the acceptances contained an unconditional clause reading: "Seller reserves the right to ship such grades as it has available at time of shipment. . . . . ."

In August, 1920, the Buyer wrote the Seller to hold up any shipments of sugar, to which request the Seller replied saying: "We can make shipment of this any time during the month of September that seems most convenient to you, and will be glad to have you give us an approximate date on which it will be agreeable for shipment to go forward". (rec. 41). Without further communication with the Buyer the Seller shipped the sugar on September 3rd and on September 7th the Buyer wired the Seller that the sugar would

be refused. Upon arrival in September the sugar was refused and stored for the Buyer's account. On November 30, 1920, the Seller wired the Buyer that "Unless you accept and pay for sugar at once we will resell this sugar for your account" (rec. 44) and the sugar was resold between December 11th and 20th, 1920.

The testimony of wholesale grocers offering to testify that the market price of sugar in Macon, Georgia, during September, 1920, ranged from nineteen to sixteen cents and likewise as to price in October, November, and December was excluded over the objections of counsel for the Buyer, as was the testimony as to actual sales made by the witnesses in Macon, Georgia, during September, October, November and December of 1920.

(G) ASSIGNED ERRORS LOGICALLY GROUPED.

The assigned errors fall into three groups as follows:

1. Those denying that the offers and acceptances sued upon ever could or did give rise to any contractual relationship between the Seller and the Buyer.

2. Constitutional questions arising from striking certain pleas in defendant's answer and in holding that the Lever Act upon which the pleas were based was void because in violation of the Constitution of the United States.

3. Errors respecting evidence and in giving charges.

PART TWO.

FIRST GROUP OF ERRORS—THE OFFERS AND ACCEPTANCES.

Section 1. Statement of this part of the case.

(a) Variations between offers and acceptances.

The printed record shows the following variations between the terms of the admitted offers and the corresponding clauses of the claimed acceptances:

Offers.	Acceptances.
Exhibits A and B (Rec. 7, 8)	Exhibit C (rec. 9).
Subject to acceptance by:—A. S. R. Co.	Blank
Delivering Carrier L. & N., C. of Ga.	L. & N.
Blank	Basis 22.50 Freight (f. o. b. New Orleans).
Blank	Terms: Cash less 2% 7 days.
In event assortment is not furnished prompt Seller reserves right to ship such grades as it has available at the time of shipment.	Seller reserves right to ship such grades as it has available at time of shipment.

(b) Assignment of errors, Group Two.

The specific assigned errors in this group (rec. 34) are as follows:

"3. Because the court erred in not sustaining the demurrer of the defendant to all of the counts of plaintiff's petition, such demurrer claiming and plaintiff's pleadings showing that the alleged contracts sued on by plaintiff were 'subject to acceptance by American Sugar Refining Company,' and the pleadings further showing that there had been no acceptance by said American Sugar Refining Company.

"4. Because the court erred in not sustaining defendant's demurrer to all the counts of plaintiff's petition, said demurrer directing the attention of the court to the fact that no contract had ever been entered into between the parties as appeared from the pleadings, because the offer of this defendant to contract contained a provision as follows:

'In event the assortment is not furnished prompt, seller reserves the right to ship such grades as it has available at the time of shipment,'

and the alleged acceptance giving the seller, not, as the offer gave, a conditional right to ship such grades as it had available, but the absolute right to select such grades as were available to it, such offer and acceptance being different no contract was made, and the court erred in not sustaining defendant's demurrer to that effect.

"5. Because the court erred in admitting over the objections of the defendant the offer to contract and the claimed confirmation thereof, it being objected that there was no acceptance of the offer in terms in which it is made, the offer giving the seller the contingent right to ship such grades as it had available and the acceptance being an absolute right upon the part of the seller to make such shipments."

Section 2. Argument and authorities.

The offers contained the clauses:

> "In event assortment is not furnished prompt Seller reserves right to ship such grades as it has available at the time of shipment."

The acceptance blanks have to correspond with this, the clause, to wit:

> "Seller reserves right to ship such grades as it has available at time of shipment."

We assume that the true meaning of the offers was to provide that if the assortment, meaning both the grades and the sizes of packages desired, was not furnished before September 1st, the Seller would have the right to ship any grade available. In point of fact, the offers did contain the assortments at the time they were given, specifying both the kind of packages and the grades of sugar desired, so that these stipulations were really without force or meaning in the offers given. When in the acceptance the Seller, without condition, reserved the absolute right to ship any grade that was available at the time of shipment, there was a material difference between the offers made and acceptances given. The practical materiality of the reservation of the right to ship any grade is easily apparent.

In American Sugar Refining Co. v. Newnan Grocery Company, 284 Fed. 835, the Court had under consideration an offer and acceptance identical with the offers and acceptances in the case at bar except that there was no punctuation in the offer setting off the clause

> "In event assortment is not furnished prompt, seller reserves the right to ship such grades as it has available at the time of shipment."

In the case at bar the clause quoted is contained between

two periods and the offers were prepared by the Seller. At page 836 of the decision just cited the Circuit Court of Appeals said:

> "If the District Judge is correct in placing a period where he did (so as to enclose the clause last quoted between periods), there would seem to be a material difference between the offer and the acceptance."

Under the facts of the case at bar, the Circuit Court of Appeals would hold that no contract existed for the reason that the unqualified reservation in the acceptance of the right to ship any grade available differed substantially from the corresponding clause of the offers.

The presumption that the parties intended to make a contract is offset by the presumption against the party drawing the contract, leaving the burden of showing a contract upon plaintiff, which the evidence failed to do.

The punctuation adopted by the Seller is the only grouping of the words that can give any meaning to all the words in the clause quoted. The words "in event assortment is not furnished prompt" cannot be applied to what precedes them, the right of substitution in the Seller being absolute, and they must be connected with the words following them in order to have any meaning whatsoever. When so connected the substantial difference between the qualified right to ship other grades in the offers and the unconditional absolute right to ship any grades as contained in the acceptances keep such offers and acceptances from amounting to contracts.

The other variations between the offers and acceptances shown at page 5 ante, are sufficient to prohibit any contracts.

Eliason v. Henshaw, 4 Wheat. 225, 4 L. Ed. 556;
Tilley v. Chicago, 103 U. S. 155, 26 L. Ed. 374;
Monk v. McDaniel, 116 Ga. 108.

PART THREE.

SECOND GROUP OF ERRORS—CONSTITUTIONALITY OF LEVER ACT AS CIVIL STATUTE.

Section 1. Statement of this part of the case.

(a) Pleading.

In paragraphs 23 and 25 (rec. 20, 21) and in paragraphs 19 and 21 (rec. 23) defendant pleaded:

> "19. Defendant shows that under no circumstances is plaintiff entitled to sue defendant, even if the contract was valid and enforceable, for more than one cent per pound profit on what the said sugar cost the plaintiff, which was the prima facie reasonable profit that was fixed by the President of the United States by Act of Congress dated August 10, 1917, and at all events said plaintiff would not be entitled to more than a reasonable profit on said cost price of said sugar; and this defendant shows that under no circumstances should said plaintiff have and recover anything more than a reasonable profit on the cost price of said sugar to said plaintiff, if the court should decide that said contract is valid and enforceable.
>
> "21. For further answer herein, defendant shows that under no circumstances should it be required to accept the sugar described in the petition, for that in selling said sugar for future delivery and for delivery more than thirty days after the alleged contract of sale, plaintiff violated the Act of Congress known as the Food Control or Lever Act, being the Act of Congress of August 10, 1917, as amended by Act of October 22, 1919, in that said sale tended to increase the price of sugar and to promote the hoarding thereof."

Plaintiff demurred to the above pleas (rec. 25) and said demurrers were sustained (rec. 28, 29) and the pleas stricken.

Section 2. Assignment of errors, Group Two.

The specific errors assigned in this group (rec. 33, 34) are as follows.

> "1. Because the court erred in its ruling on the demurrer of the plaintiff to the answer of this defendant in sustaining the said demurrer and in holding that the Act of Congress approved August 10, 1917, known as the Lever Act, is unconstitutional, null and void, because in violation of and repugnant to the fifth and sixth Amendments to the Constitution of the United States.
>
> "2. Because the Court erred in striking those parts of this defendant's answer wherein defendant pleaded and relied upon the Act of Congress of August 10, 1917, chapter 53, page 276, which Act defendant pleaded as a valid, constitutional statute of the United States, and which Act was contended by plaintiff in the demurrer to defendant's answer to be unconstitutional, null and void, in violation of and repugnant to the fifth and sixth Amendments to the Constitution of the United States."

Section 3. Argument and authorities.

The Congress on August 10, 1917, Chapter 53, enacted a statute entitled:

> An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel. (40 Stat. C. 53, page 276.)

Section 5 of this Act, so far as it is here material, authorizes the President when he

> shall find it essential, to license the importation, manufacture, storage, mining, or distribution of any necessaries, in order to carry into effect any of the purposes of this Act.

This section further provided:

> . . . . The President may, in lieu of any such unjust, unreasonable, discriminatory, and unfair storage charge, commission, profit, or practice, find what is a just, reasonable, nondiscriminatory and fair storage charge, commission, profit, or practice, and in any proceedings brought in any court such order of the President shall be prima facie evidence. Any person who, without a license issued pursuant to this section, or whose license shall have been revoked, knowingly engages in or carries on any business for which a license is required under this section, or willfully fails or refuses to discontinue any unjust, unreasonable, discriminatory and unfair storage charge, commission, profit, or practice, in accordance with the requirement of an order issued under this section, or any regulation prescribed under this section, shall upon conviction thereof be punished by a fine not exceeding $5,000.00, or by imprisonment for not more than two years or both: (40 Stat. C. 53, Sec. 5, page 277).

In administering Section 5 of the above Act, the President determined and published his finding that one cent per pound above cost would be the reasonable profit allowed on resales of sugar. Any resales at a higher price than could be had by adding one cent to the cost of the sugar were unreasonable and illegal in violation of the Act and the proclamations of the President based thereupon.

Defendant in error was a licensee under the United States Food Administration and by accepting such license undertook to transact its business in accordance with the Lever Act and the regulations made by the President thereunder.

In Addy Co. v. United States, decided February 25th, 1924, since this appeal was taken, 264 U. S. ——, this court as we understand the decision recognized the validity of the Lever Act and of the President's regulations thereunder when such Act and regulations "applied only to transactions thereafter begun". In the instant case the transactions here involved began after the passage of the Lever Act, the announcements of the President's regulations and the acceptance by the defendant in error of a license under such Act and regulations.

The fact that this court in United States v. Cohen, 255 U. S. 81, held the Lever Act to be void as a criminal statute does not as said by this court in Levy Leasing Co. v. Siegel, 258 U. S. 242, make invalid the statute as a civil regulation.

In Henrikson v. Pacific Coast Packing Co., 187 Pac. Rep. 377, the court refused to enforce the contract price agreed to be paid for fish, as the price was higher than fixed by the Food Administration, saying at page 379:

> "If the respondent can recover under the guaranty clause in the contract, more than the price fixed by the Federal Food Administration, the law under which such prices were so fixed would be nullified . . . If the Act could be avoided by contracts such as the one here in question, its provisions would be largely defeated. . . . While the Food Administration Act remains in force and effect, its provisions must be held controlling, and that contracts in violation thereof are unenforceable."

In Detroit Edison Co. v. Wyatt Coal Co., 293 Fed. 489, the first headnote reads:

"Where during the war, in violation of Lever Act, sec. 25 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, sec. 3115-1/8q), purchaser paid in excess of contract price for coal received, the seller and buyer were in pari delicto, and the purchaser could not recover overpayment made."

Other decisions holding the Lever Act to be valid are:

Ayulo v. Mollen, Thompson, James Co., 283 Fed. 863;
Morris Adler & Co. v. Jones & Co., 94 So. (Ala.) 816;
Segal v. Chemical Importing & Mfg. Co., 199 N. Y. S. 250;
Neil v. Utah W. Gro. Co., 210 Pac. 201.

The Lever Act being valid, a contract in contravention thereof is void.

Harris v. Runnels, 12 How. 79, 13 L. Ed. 901;
Miller v. Ammon, 145 U. S. 425, 36 L. Ed. 759;
Burck v. Taylor, 152 U. S. 649, 38 L. Ed. 578;
Waskey v. Hammer, 223 U. S. 85, 56 L. Ed. 359.

Bearing in mind that the Lever Act was enacted

"to provide further for the national security and defense by . . . . conserving the supply, and controlling the distribution of food products . . . ."

it would seem clear that a contract made in violation of its provisions or in violation of any regulation of the President made under authority of the Act would be illegal and unenforceable. Such being the law, pleas setting up as a defense violations of the Lever Act and of the regulations of the President under the Act should not have been stricken and the court erred in so doing.

Even were we wrong in our contention that the Lever Act

makes void the contracts sued on here, certainly the regulations would limit the right of recovery prima facie to the profit fixed by the President, leaving to the jury the question of whether or not such fixed profit was reasonable.

PART FOUR.

THIRD GROUP OF ERRORS—RELATING TO THE TRIAL.

Section 1. Statement of this part of the case.

The trial court erroneously charged the jury that they need only consider whether the resales made between November 30 and December 20, 1920, were within a reasonable time. The evidence showed that the sugar was refused by Buyer on September 7, 1920, that it was deliverable under the contracts during the entire month of September and that the market value of sugar was much greater during September, October and November than in December.

The trial court refused to permit witnesses for the Buyer to testify to the market value, or to actual sales of sugar made by them, in Macon, Georgia, during the months of September, October, November and December, 1920, which evidence tended to show that the Seller did not exercise due diligence in making the resales or obtain fair prices on resales of the sugar.

Section 2. Assignment of errors, Group Three.

The specific assigned errors in this group (rec. 35, 36, 37) are as follows:

> "9. Because the court erred in charging the jury as follows:

'You will simply apply your mind to the solution of the fact of whether a sale between the 30th of November and the 20th of December was a reasonable time.'

such charge having been excepted to before the jury retired and an exception having been allowed, the charge being error in that under the contracts sued on delivery was to be made during September. It was therefore error of the court to submit to the jury November 30th as the date from which they would reckon a reasonable time for a resale.

"13. Because the court erred in not permitting the witness J. E. Yates, a wholesale grocer of Macon, Georgia, to testify to his sales beginning September 1st, 1920, and continuing to September 30, 1920, and to testify that between said dates he sold sugar to retail grocers in and around Macon, Georgia, in quantities ranging from one hundred pounds to one thousand pounds at prices September 1st, 1920, of nineteen cents per pound gradually decreasing from that date to September 30, 1920, when the price was sixteen cents per pound, said testimony having been offered, objected to, and the objections sustained by the trial court.

"14. Because the court erred in not permitting the witness R. B. Small, a wholesale grocer of Macon, Georgia, to testify to his sales beginning September 1st, 1920, and continuing to September 30, 1920, and to testify that between said dates he sold sugar to retail grocers in and around Macon, Georgia, in quantities ranging from one hundred pounds to two thousand and thirty pounds, at prices September 1st, 1920, of nineteen cents per pound, gradually decreasing from that date to September 30, 1920, when the price was sixteen cents per pound, said testimony having been offered, objected to, and the objections sustained by the trial court.

"15. Because the court erred in refusing to permit the witness R. B. Small to testify that he was in the wholesale grocery business in Macon, Georgia, an officer in the defendant corporation, had been in the business for more than ten years, was familiar with the method and prices of sugar, and that from December 1st to December 15th, 1920, he had sold sugar at prices ranging from nine and one-half cents to ten and two-tenths cents per pound in quantities ranging from one hundred to three hundred pounds.

"16. Because the court erred in not admitting the testimony of J. E. Yates and in sustaining an objection to such testimony, which testimony was to the effect that wholesale grocers receive from one-fourth to one-half cent per pound in excess of the cost to them in purchasing from the refiners and that the witness during the first fifteen days of December, 1920, had sold sugar at prices around nine to ten and two-tenths cents per pound.

"17. Because the Court erred in not permitting the witnesses R. B. Small and J. E. Yates, wholesale grocers of Macon, Georgia, to testify as to prices obtained by them from sales of sugar to retail merchants and chain stores for the months of September, October and November, 1920.

"18. Because the Court erred in not permitting the witness W. E. Small to testify indicating market value and as affecting the question of the legality of the resales pleaded to sales of sugars and quotations equal to and greater and at prices higher than was obtained about the same time by plaintiff in making its sales."

Section 3. Summary of Third Group of Errors.

The errors shown in the division of the assignment of errors next above present specific errors as follows:

1. In removing from the consideration of the jury the determination of the question as to whether resales made between November 30th and December 20th were within a reasonable time after September 7th or September 30th.

2. In not permitting evidence to be introduced tending to show market value which evidence would have justified a verdict finding that neither due diligence nor proper prudence was exercised in reselling the sugar.

Section 4. Argument and authorities.

Under the contracts sued upon deliveries were to be made during September. Actual deliveries were tendered during September and the Buyer refused to accept the sugar. Thereafter, if the Seller choose to resell the sugar for the Buyer's account the duty rested upon it to make the resale within a reasonable time after the refusal in September, and certainly within a reasonable time after September 30th. Whether resales made between November 30th and December 20th were within a reasonable time after September 30th, or earlier in September, was a question for the jury to determine and the court improperly removed the question from the consideration of the jury.

Brooke v. Robson, 3 Ga. App. 136;

Bennett v. Mann, 24 Ga. App. 581 (2);

Robson & Evans v. Hale & Sons, 139 Ga. 753, at 755;

Robson & Evans v. Weil, 142 Ga. 429, at 431 (5).

To assist the jury in determining whether the resales were diligently and prudently made evidence was offered as to the market value of the sugar in Macon during September, October, November and December and this evidence showed actual sales made throughout the period at much

higher prices than the Seller ultimately obtained in December. Such evidence was excluded erroneously and the jury was allowed to bring in a verdict in favor of the Seller based upon the difference between the resale prices obtained in December and the contract price.

Respectfully submitted.

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AUTHORITIES CITED

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1923

No. 400

THE A. B. SMALL COMPANY,
Plaintiff in Error

v.

THE AMERICAN SUGAR REFINING CO.,
Defendant in Error

In Error to the District Court of the United States for the Southern District of Georgia

BRIEF FOR DEFENDANT IN ERROR

STATEMENT OF THE CASE

This suit grows out of the failure and refusal of a buyer to accept and pay for certain sugar which it had bought, the price of sugar having materially declined since the contract was made.

Two contracts were made between The American Sugar Refining Company and The A. B. Small Company, a wholesale grocer of Macon, Georgia, for the sale and purchase of 50 barrels, each, of refined sugar for future delivery. (Transcript pp. 7-8.) Orders

signed by the buyer were submitted to the seller through a local agent. They were accepted, and written confirmations of the sale were mailed to the buyer by the seller from its New Orleans refinery. (Transcript pp. 38-40.)

The sugar was shipped in accordance with the contract, which provided that 'delivery should be complete on receipt of goods by the carrier.' On the arrival of the sugar at destination, the buyer refused to accept the same and repudiated its contract. It suggested:

> "For the good of whom it may concern we would suggest that the carload of sugar be stored to save any additional cost against whoever might be affected."
>
> (Transcript p. 42.)

This was done and the Refining Company billed the buyer for the storage and unloading charges. (Transcript p. 42.)

The sugar arrived early in September. (Transcript p. 41.) The seller continued its efforts to induce the buyer to take it out of storage and pay according to contract until November 30th, when it wired the buyer that unless it would accept and pay for the sugar at once, it would be resold for its account. (Transcript p. 44.) Pursuant to this notice the sugar was resold, and the buyer was called on for the difference between the original contract price and the amount realized on resale, together with demurrage, unloading, and storage charges. (Transcript p. 44.) To this demand it paid no attention.

This suit was brought to recover the damages sus-

tained by the Plaintiff by reason of the breach by the Defendant of its contract.

The complaint is in three counts:

1. For damages measured by the difference between the contract price and the price realized on resale.
2. For damages measured by the difference between the contract price and the market price at the time and place of delivery.
3. Upon an account for the price of the sugar, less the amount received on the resale thereof.

The Defendant demurred to the petition upon the ground that the acceptance differed from the terms of the offer, both being set out in the petition, and therefore, no contract was made. This demurrer was overrruled. (Transcript p. 28.)

By its answer, the Defendant again undertook to set up that no contract had been made on account of the alleged variance between the offer and the acceptance. It also set up as a special defense that the Plaintiff was not entitled to sue Defendant for more than one cent per pound profit on the sale of the sugar, and that Plaintiff was not entitled to more than a reasonable profit, and therefore, the Plaintiff could not recover under the Food Control, or Lever Act. It alleged in general terms, but without stating the facts upon which the contention was based, that in selling the sugar, Plaintiff violated the Food Control Act in that the sale tended to increase the price of the sugar and promoted the hoarding thereof.

On demurrer, the paragraphs of the answer alleging a variance between the offer and the acceptance and the special defenses set up by the Defendant were stricken.

On the trial, the execution of the contracts was admitted; the delivery of the sugar, its refusal by the Defendant, and the storing thereof at Defendant's suggestion, were proved. The resale was established and the efforts made by Plaintiff to secure a fair price therefor. It was shown from the market quotations that the sugar brought on resale the full market price. Certain testimony offered by the Defendant to show that sales of small lots, not offered by refiners, had been made in the local market at a higher price than that at which Plaintiff resold the sugar, was excluded by the Court. (Transcript pp. 51-57.)

The jury found for the Plaintiff the full amount sued for, measuring the damages at the difference between the contract and the resale price, and adding demurrage, unloading and storage charges. (Transcript p. 32.)

Defendant excepted to the overruling of its demurrer to the petition, the sustaining of Plaintiff's demurrer to the answer, the exclusion of the evidence, and to certain portions of the Court's charge to the jury.

ASSIGNMENTS OF ERROR

There are eighteen assignments of error. Several are not mentioned by Plaintiff in Error in its brief, and therefore, are abandoned. The other assignments may be grouped as follows:

1. That there was a material variance between the offer and acceptance.
   (Assignments 3, 4 and 5, Transcript p. 35.)
2. That the plea setting up violation of the Food Control or Lever Act was improperly stricken.
   (Assignments 1 and 2 Transcript pp. 33, 34.)
3. That certain evidence offered by Defendant was improperly stricken.
   (Assignments 13, 14, 15, 16, 17 and 18. Transcript pp. 36, 37.)
4. That the Court erred in his charge to the jury.
   (Assignments 9 and 10, Transcript p. 35.)

BRIEF OF THE ARGUMENT

I.

THERE WAS NO MATERIAL VARIANCE BETWEEN THE OFFER AND THE ACCEPTANCE.

The offer in each case was for the purchase of 50 barrels of refined sugar at a given price, the **order containing the assortments,** by which is meant, in the sugar trade, the grades and the kind of packages.

The order was written on a printed blank of the American Sugar Refining Company. On the back of the order was the following typewritten addition thereto, which was signed by the purchaser:

> "Barrels or equivalent at price of 22 1-2 cents, assortment to be furnished seller by buyer before Sept. 1, 1920, but subject to such substitutions as seller may find necessary to make.

In event assortment is not furnished prompt seller reserves right to ship such grades as it has available at the time of shipment. Delivery to be made during September or as soon thereafter as possible. The buyer will accept delivery when made by seller. Seller is to have option of making delivery from any of its refineries, all transportation charges to be for account of buyer. Subject to rules and regulations of any Government Department at time of shipment or delivery."

(Transcript p. 7.)

The acceptance was also on a printed form of the Refining Company, which is almost an exact counterpart of the offer. The assortment (i. e., packages and grades) and the price is exactly the same as in the offer. Across the face of the acceptance, or confirmation as it is called, entered thereon by rubber stamp is the following:

"Seller reserves right to ship such grades as it has available at time of shipment, delivery to be during September, or as soon thereafter as is possible, and buyer will accept delivery when made by seller.

Seller is to have option of making delivery from any of its refineries.

All transportation charges to be for account of the buyer.

Subject to rules and regulations of any Government Department at time of shipment or delivery."

(Transcript p. 9.)

By comparing the typewritten portion of the offer with the rubber stamp provisions of the acceptance,

it will be seen that beginning with the clause "seller reserves right to ship such grades as it has available" in the fourth line of the quoted clauses of the offer, the language of the two is precisely the same, though the punctuation is quite different. As both offer and acceptance were prepared by the Refining Company and as that Company unquestionably intended to accept the offer in the terms in which it was made, it is fair to conclude that the difference in punctuation is due to a careless typist rather than to an intentional departure from the terms of the offer. If a period is inserted after the word "prompt" and the expression "seller reserves the right to ship" is the beginning of a new sentence, then there is no difference whatever in the offer and acceptance. This is conceded by the Defendant. Defendant contends, however, that the clause as printed: "In event assortment is not furnished prompt seller reserves right to ship" makes the seller's right to ship available grades dependent on the buyer's failure to furnish assortments promptly, whereas in the acceptance the right to ship available grades is unqualified. The whole argument, therefore, turns on the position of a period.

As we understand it the offer should be read as follows: "Assortment to be furnished seller by buyer before September 1, 1920, but subject to such substitutions as seller may find necessary to make in event assortment is not furnished promptly. Seller reserves right to ship such grades as it has available at time of shipment." The same careless typist who wrote on the order "prompt" for "promptly" placed

his period in the wrong place. It should have been after the word "prompt" instead of before the clause "in event assortment is not furnished prompt." There was no occasion to place on the confirmation the words contained in the order, "assortments to be furnished seller by buyer before September 1, 1920, but subject to such substitutions as seller may find necessary to make in event assortment is not furnished prompt" for the assortment was stated by the buyer in the order.

This is not a case of a buyer writing an order and a seller preparing an acceptance which is in different terms. Both papers were prepared by the seller whose purpose evidently was to accept the offer in the terms in which it was made. Both parties thought a contract had been made; both acted on that assumption. The buyer wrote the seller to hold up further shipments because the market was overstocked and the seller replied agreeing to withhold shipment, mentioning these two contracts, identifying them by date and amount. When the time arrived shipment was made. The buyer rejected the shipment but did not suggest that there had been no meeting of minds on the terms of the contract. In none of the correspondence, nor in the personal interviews between officers of the Defendant and the representatives of the Plaintiff was there any suggestion that the Defendant's order had not been accepted. Is the construction of the contract to be made to depend upon the placing of the period, and the manifest intention of both parties to be defeated by this construction?

"Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail; but the court will first take the instrument by its four corners, in order to ascertain its true meaning. If that is apparent on judicially inspecting it, the punctuation will not be suffered to change it."

Ewing v. Burnet, 11 Peters 41, 9 L. ed. 624.

"The construction of a written contract is determined by the words used, and their relation to each other, and not by the punctuation."

Holmes v. Phenix Ins. Co. of Brooklyn, N. Y., 98 Fed. 240 (2).

The United States Circuit Court of Appeals for the Fifth Circuit had under consideration a contract on the same forms of the American Sugar Refining Company, containing the same typewritten provisions on the back of the offer and the same clauses stamped on the acceptance. But in the typewritten part of the offer there was no period or other punctuation mark. The District Judge undertook to punctuate the sentence and placed the period after the clause "but subject to such substitutions as seller may find necessary to make." So punctuated he held that there was a variance between the offer and the acceptance. The Court of Appeals reversed this decision, placing the period after the clause "in event assortment is not furnished prompt," where we say it should be placed. In the course of its opinion the Court said:

"A contract will be given that construction which will make it valid and binding, instead

of a construction which would make it void or unenforceable. Hobbs v. McLean, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. ed. 940. Likewise a contract should be construed in favor of mutuality. 13 C. J. 539; Minn. Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529. A construction which makes confused verbiage intelligible will be adopted. Senter v. Senter, 87 Ohio St. 377. 101, N. E. 272. * * * * *

"It is hardly to be supposed that the plaintiff, who prepared both the form of the offer and the form of the acceptance, would intentionally have made the difference which formed the basis of the opinion of the District Judge. If a period be placed after the word 'prompt,' there is no material difference between the offer and the acceptance, and the unconditional right to ship available grades of sugar is reserved to the seller in the offer as well as in the acceptance. This construction is, as it seems to us, a reasonable one, and should be adopted, because it has the effect of making the contract a valid and binding one."

American Sugar Refining Co. v. Newnan Grocery Co., (C. C. A. 5th Cir.) 284 Fed. 835, 836.

Even if it were not allowable to change the punctuation so as to make the language accord with the manifest purpose and intent of the parties and so as to make a contract rather than destroy one, there is no material variance in the offer and the acceptance. It is alleged in the petition that the word "assortment" as understood in the sugar trade comprehends both grades and packages. The offer provides that the assortment of grades and packages is to be

furnished the seller by the buyer before Sept. 1, 1920, but "subject to such substitutions as seller may find necessary to make." The seller, therefore, had the absolute right to make substitutions where it found it necessary to do so. And these substitutions might be either of grades or packages. The offer further provided that "in the event assortment is not furnished prompt seller reserves the right to ship such grades as it has available at the time of shipment." This sentence and the provision it makes are surplusage, for under the first clause the seller had the absolute right to make substitutions, both of grades and of packages, if it found it necessary to do so. Adding the clause does not lessen the seller's right or make it conditional or dependent on the failure of the buyer to promptly furnish assortments. In the acceptance the seller "reserves right to ship such grades as it has available at time of shipment." This is certainly no broader than its right to make such substitutions of grades and packages as it may find necessary to make. The language is slightly different but the effect is the same.

Both the offer and the acceptance contain the assortments, both packages and grades being given. Therefore, though the form provided that assortments should be furnished before September 1, 1920, this was wholly unnecessary as the assortments accompanied the order and were a part thereof. The seller not only accepted the order but it accepted and agreed to deliver the assortments named, and in fact did deliver the very assortment called for in the order. It reserved, however, the right to ship

such grades as it might have available at time of shipment. The buyer recognized that this might be necessary and therefore in the order it was expressly provided that the seller might make such substitutions as were necessary. The difference between the two is the time honored distinction between "tweedle dum" and "tweedle dee." To say that a contract executed by two business firms, recognized by both of them, and acted upon, is to be set aside on such narrow and technical construction of language is to do violence to common sense and the rules of construction universally recognized.

II.

SPECIAL DEFENSES BASED ON THE LEVER ACT

Two defenses, or special pleas, based on the Lever Act were made.

First, that Plaintiff is not entitled to sue "for more than one cent per pound profit on what the said sugar cost the plaintiff, which was the prima facie reasonable profit that was fixed by the President of the United States by Act of Congress dated August 10, 1917, and at all events said plaintiff would not be entitled to more than a reasonable profit on said cost price of said sugar."

Second, that Plaintiff in selling sugar for delivery more than thirty days after the contract of sale violated the Act of Congress known as the Food Control or Lever Act "in that said sale tended to increase

the price of sugar and promote the hoarding thereof."

Both these defenses were stricken on demurrer.

1.

The allegations of the second defense are so clearly conclusions of the pleader without one single fact being stated upon which the conclusions can be based, that they are manifestly insufficient. We deem it unnecessary to discuss them further.

Witherell & Dobbins v. United Shoe Machinery Co. (C. C. A. 8th Cir.) 267 Fed. 950.

Furthermore the regulation evidently referred to (Special License VI A 2) was cancelled January 26, 1919, before the contracts were made.

2.

The first defense confuses a **profit** fixed by the President, at one time, for retailers of sugar, with the law of **damages** applicable to breach of contract for the sale of goods. It is not claimed that the price of the sugar in suit was unreasonable, nor is it alleged that the damages asked by the seller would yield to it a profit of more than one cent per pound on the transaction. The plea simply avers that the seller's recovery in damages is limited to the one cent per pound profit permitted under some regulation, not disclosed, made by the Food Administration under the authority of the Lever Act. **Damages for breach of contract** and **profits** on particular transactions are not synonymous. The law of dam-

ages for breach of contract for the sale of goods is not in anywise controlled by the alleged profits on any particular transaction.

Even if there had been a regulation of the Food Administration, binding in law, limiting the profit of refiners of sugar to one cent per pound, the defendant's plea would not be a good defense to this action, for it is not alleged that the selling price of the goods, or the damages claimed for breach of the contract, would yield to plaintiff a profit greater than one cent per pound, or more than a reasonable profit. However, the Food Administration did not fix any standard of profit to guide refiners in their dealings with customers, except that the sugar refined by them should be sold at not more than a fair and reasonable advance over cost. (Rule B-2, Food Administration Special License Regulation No. VI.) This regulation, however, was repealed on January 26th, 1919, before the contracts were made.

The regulation limiting the profit on the sale of sugar to one cent per pound was applicable only on the sale of package sugar by retailers to consumers. (Food Administration Special License Regulation No. XI-A-5.) A mere reading of this regulation shows that it was not intended to, and did not, include refiners of sugar. Furthermore, this regulation was repealed on May 31st, 1919.

It is apparent, therefore, that defendant's plea not only confuses **profit** with **damages**, but that the regulation referred to applied only to retailers, and not refiners, and was cancelled more than a year before the contracts in suit were entered into. The

plea is so indefinite and vague, that it can hardly be considered as setting up any defense whatsoever.

The only possible ground on which the plea could be considered as sufficiently stating a defense would be to construe the words "and at all events said plaintiff would not be entitled to more than a reasonable profit on said cost price of said sugar" as an allegation that the plaintiff would receive more than a reasonable profit if the contracts were enforced. This would be giving the plea more favorable interpretation than is warranted by the language used, and would place the defense squarely on the provisions of the fourth section of the Lever Act, which was declared to be unconstitutional by this Court as being too vague and indefinite to be capable of enforcement.

United States v. L. Cohen Grocery Co., 255 U. S. 81, 65 L. ed. 516.

And the provision penalizing conspiracies to "exact excessive prices for any necessaries" was like wise held unconstitutional for the same reason.

Weeds, Inc., v. United States, 255 U. S. 109, 65 L. ed. 537.

But it is insisted that these were criminal cases and that while the provisions of the statute were held to be unconstitutional as too vague and indefinite to constitute crimes, they are nevertheless valid and enforceable as civil regulations. We do not so understand the effect of the decisions.

An Act of Congress in violation of the Constitution is

"as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law."

No purpose can be manifested by an unconstitutional statute

"since it is not law for any purpose."
Chicago I. L. R. Co. v. Hackett, 228 U. S. 559, 567, 57 L. ed. 966, 969.

In the oft quoted language of Mr. Justice Field:

"An unconstitutional act is not law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

Norton v. Shelby County, 118 U. S. 425, 30 L. ed. 178, 186.

An unconstitutional law

"is void and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous but is illegal and void."

Ex Parte Siebold, 100 U. S. 371, 25 L. ed. 717, 719.

Counsel for Plaintiff in Error in their brief say:

"The fact that this Court in U. S. v. Cohen held the Lever Act to be void as a criminal statute does not, as said by this Court in **Levy Leasing Co. v. Siegel, 258 U. S. 242,** make invalid the statute as a civil regulation."
(Plaintiff's brief p. 12.)

The Court did not say in the Siegel case that the Lever Act was good as a civil regulation. The Court

distinguished the Cohen case, saying that case "dealing with definitions of crime, is not applicable." This is the only reference to the case in the opinion. We do not construe this as an intimation that this unconstitutional statute is valid in any particular or for any purpose.

Counsel also say that the Court in **Addy Company v. United States, 264 U. S.—, 68 L. ed. 348** "recognized the validity of the Lever Act and of the President's regulations thereunder." (Plaintiff's brief p. 12). In the Addy case the Court was considering section 25 of the Lever Act and not section 4, which alone was involved in the Cohen Company and Weeds cases, but so far from recognizing the constitutionality of the section then under consideration the Court purposely adopted a construction which enabled it to avoid deciding its constitutionality. Said Mr. Justice McReynolds:

> "If it (the order of the Fuel Administration) be construed as applying to the sales of coal purchased by petitioners prior to August 23rd we must decide a grave constitutional question. Not necessary to consider if another view be accepted. * * * * * * If this difficulty can be eliminated by some reasonable construction of the order, it should be accepted."

And again he said:

> "We are not unmindful of the forceful argument to the contrary and we consciously refrain from indicating an opinion respecting the validity of the order as interpreted."

There is no inconsistency between the Cohen and

the Addy cases. The later case does not modify or limit the former. They involve different sections of the Act. The fourth section related to foods and the twenty-fifth to fuels. The twenty-fifth section is essentially different from the provisions of the Act relating to food. As to coal and coke, the President was given the right absolutely by section 25 to fix the price wherever and whenever sold, and if a purchaser or dealer failed or neglected to conform to the prices or regulations, the President was authorized to requisition, or take over his business, paying him just compensation therefor, the Act preserving to the producer or dealer the right to sue the United States for such sums as would provide just compensation to him. There are no such provisions in the Act as to sugar or other foods. The twenty-fifth section relating to fuel has not been declared unconstitutional, but the fourth section relating to foods has. There was a valid criminal penalty attached to section 25. Since the Cohen and Weeds cases there is none as to section 4. Defendant can derive little comfort from the Addy case.

Defendant also relies on the decision in **Detroit Edison Co. v. Wyatt Coal Co., (C. C. A. 4th Cir.) 293 Fed. 489** and quotes in his brief the first head note. This case also involved the twenty-fifth section and is not authority for Defendant's position. In the Wyatt case no contract was invalidated or set aside. It there appeared that the seller had coerced the buyer into paying a higher price for coal than that fixed by the President and named in the contract. Suit was filed for the overpayment. The

Court held that the parties were in pari delicto and that no recovery would be allowed. The decision was also based upon the ground that money paid under compulsion can never be recovered unless there exists such conditions as to constitute an emergency, making it necessary to submit to the unjust demand imposed. No compulsion was shown, said the Court, and the payments were therefore voluntary and could not be recovered.

The difference between the right of the President under section 25 to fix the price of fuel and the authority claimed for him in this case is well stated by the Court of Appeals, of New York, considering precisely the same contention.

> "We are told that the statute, if unintelligible and uncertain in its inception, gained meaning and certainty and with those qualities, validity, upon the promulgation by the President of an an order fixing prices. I put aside the question whether the order, rightly construed, did prescribe a maximum beyond which charges were to be prohibited. Even if it did, it did not save the statute which it was intended to effectuate. We are not dealing here with an authority such as may be found in section 25, under which the President is expressly empowered to fix the price of coal and coke, with the aid of elaborate tests and safeguards for the protection of producers. They are to be allowed the cost of production, the expense of operation, maintenance, depreciation and depletion, and in addition thereto a just and reasonable profit (section 25). We are dealing here with an authority declared in general terms 'to make such regulations and

issue such orders as are essential effectively to carry out the provisions of this act.' "

Standard Chemical Corp. v. Waugh Chemical Corp., 231 N. Y. 51, 131 N. E. 566, 567.

The case of **Henrikson v. Pacific Coast Packing Co., 187 Pac. 377,** is authority for Defendant's position. But this decision was rendered more than a year before this Court decided the section unconstitutional in the Cohen Grocery Company case. Doubtless the Supreme Court of Washington would have followed the Cohen case had it been decided when the Henrikson case was under consideration.

The other decisions cited by Defendant as holding the Lever Act to be valid:

Ayulo v. Mollen, Thompson & James Co., 283 Fed. 863,
Morris Adler & Co. v. Jones & Co. (Ala.) 94 So. 816,
Segal v. Chemical Importing & Mfg. Co., 199 N. Y. S. 250,
Neil v. Utah W. Gro. Co., 210 Pac. 201,

held that a dealer in necessaries who under section 5 of the Lever Act and the proclamations of the President was required to be licensed could not recover the price of necessaries sold where no license had been obtained. These cases follow:

Miller v. Ammon, 145 U. S. 421, 36 L. ed. 759,

in which this Court held, that a contract of sale by

an unlicensed dealer was void where a State statute forbade the sale of intoxicating liquor, without, as a condition precedent to the right of sale, obtaining a license for the purpose. The fifth section provides that no person shall engage in or carry on any business for which a license is required unless he shall procure and hold a license issued pursuant to the section, and the engaging in business by an unlicensed dealer is punishable by fine and imprisonment. The obtaining of a license is a prerequisite. The securing of a license is a definite, specific act. To engage in business without a license is unlawful, and therefore it was held in the cases cited that contracts made by an unlicensed dealer are illegal and unenforceable. The right to license has never been questioned, but the power of the Food Administration to arbitrarily fix the maximum of profit to be made by a dealer in food products is another and altogether different matter.

No case has been cited, nor do we think any can be found since the decision in the Cohen Grocery Company case, which upholds for any purpose those portions of section 4 which this Court has declared unconstitutional.

The contention urged in this case, that the Lever Act while unconstitutional as a penal statute is valid as a civil regulation, was made in the Waugh Chemical Company case. The Court said:

> "The United States Supreme Court has held the prohibition of the Lever Act a nullity because too vague to be intelligible. The consequences of its decision are not limited to crimi-

nal prosecutions but apply to civil suits as well."

Standard Chemical Corp. v. Waugh Chemical Corp., 231 N. Y. 51, 131 N. E. 566.

A similar conclusion was reached by the Court of Civil Appeals of Texas in

Dunman v. South Texas Lumber Co., 252 S. W. 274,

The sections of the Act with reference to unreasonable profits and the fixing of prices and conspiracies with regard thereto being inoperative and invalid, Plaintiff cannot be called on to account criminally, nor does it lose any rights civilly, on account of the violation of these sections.

3.

It may be suggested that the authority of the President "to make regulations and issue orders essential to the national security and defense, to secure an adequate supply and an equitable distribution of foods" was derived from the first section of the Act, and that the licensing system was provided for in the fifth section, neither of which have been declared invalid by this Court.

The first section is the preamble of the Act, stating in general terms its purpose and the necessity for its adoption and conferring upon the President the authority to issue such orders as were essential to accomplish the results proposed. This section did not give the President any power to fix prices. The

only provision on the subject in the entire Act so far as foods are concerned are the two clauses of the fourth section which the Court has declared to be invalid.

This contention also has been considered by the Court of Appeals of New York in the Standard Chemical Company case, supra. Said Judge Cardozo:

> "The promulgation by the President of an order fixing prices did not save the statute which it was intended to effectuate. The provision 'to make such regulations and issue such orders as are essential effectively to carry out the provisions of this Act' cannot be read as a delegation of authority to fix the prices for all articles which the statute classifies as necessaries. Congress prohibited inequitable and unreasonable conduct but there is no evidence that in doing so it made the President its delegate to design and standardize the patterns of equity and reason."

And the Circuit Court of Appeals for the Fifth Circuit said:

> "The Food Administration could not under the provisions of the Act of Congress (citing the several sections of the Lever Act), which created it, arbitrarily fix the price at which future sales should be made."
>
> **Pharr & Sons Ltd. v. C. D. Kenny Co. 272 Fed. 37, 41.**

In this case a certiorari was denied.

> **Pharr & Sons Ltd. v. C. D. Kenny Co., 257 U. S. 649, 66 L. ed. 415.**

In a later case represented by the same distinguished counsel who appear for the Defendant in the case sub judice, the Fifth Circuit Court of Appeals, King, Circuit Judge, delivering the opinion, said:

> "Defendant further pleaded that under the Lever Act the United States controlled the price of sugar and that the President had fixed a profit of one cent per pound on sales of sugar at wholesale, and that therefore, the only profit in contemplation of the parties was one cent per pound. We think this defense was properly stricken on demurrer under the ruling of this Court in Pharr & Sons Ltd. v. Kenny Co., 272 Fed. 37, 41."
>
> **W. H. Goff Co. v. Lamborn & Co., 281 Fed. 613, 617.**

This Court denied a certiorari in this case also.

> **W. H. Goff Co. v. Lamborn & Co., 260 U. S. 734, 67 L. ed. 487.**

4.

Section 5 of the Lever Act authorizes the licensing of dealers in commodities classed as necessaries, and provides as the penalty for a violation of the rules governing licensees, the revocation of the license.

This section further provides:

> "Whenever the President shall find that any storage charge, commission, profit, or practice of any licensee is unjust, or unreasonable, or discriminatory, and unfair, or wasteful, and

shall order **such licensee,** within a reasonable time fixed in the order, **to discontinue the same,** unless such order, which shall recite the facts found, is revoked or suspended, **such licensee** shall, within the time prescribed in the order, discontinue **such** unjust, unreasonable, discriminatory and unfair storage charge, commission, profit or practice. The President may, in lieu of any **such** unjust, unreasonable, discriminatory and unfair storage charge, commission, profit or practice, find what is a just, reasonable, non-discriminatory and fair storage charge, commission, profit or practice, and in any proceeding brought in any court such order of the President shall be prima facie evidence." (Emphasis ours.)

It is manifest from this section that it was not the purpose of Congress to confer upon the President the authority to fix by general rule the profit at which future sales of necessaries could be made. It was a condition precedent to the exercise of authority by the President that he should find a licensee to be making an unjust or unreasonable charge or profit. There is no suggestion that in the case sub judice he ever so found as to the Plaintiff. The finding of the President as to what is a just or reasonable profit was not intended to be general in its application but was to apply only to the particular licensee who had theretofore been exacting, or attempting to exact, an unreasonable or unjust rate or charge. The language of the Act is that whenever the President finds that the profit **"of any licensee"** (not of sellers generally) is unjust or unreasonable, he may order **"such licensee"** to discontinue the same but his order must

recite the facts found. This contemplates an investigation as to the conditions under which the particular licensee was doing business and as to the profit charged.

If the Act had authorized the arbitrary fixing of a profit to be charged, it would have violated the due process clause of the constitution, for

> "the due process clause requires that every man shall have the protection of his day in court and the benefit of the general law—a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that any citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."
>
> **Truax v. Corrigan, 257 U. S. 312, 332, 66 L. ed. 254, 263.**

> "The right to contract about his own affairs is part of the liberty of the individual protected by the due process clause of the Federal constitution."
>
> **Adkins v. Children's Hospital, 261 U. S. 525, 67 L. ed. 785.**

Plaintiff's business is not clothed with a public use so as to be subject to regulation by the public.

> **McFarland v. American Sugar Refining Co., 241 U. S. 79., 60 L. ed. 899.**

> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was

clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. * * * * *

"An ordinary producer, manufacturer, or shop keeper may sell or not sell, as he likes; and while this feature does not necessarily exclude businesses from the class clothed with a public interest, it usually distinguishes private from quasi public occupations. * * * * *

"But never has regulation of food preparation been extended to fixing wages or the prices to the public, as in the cases cited above, where fear of monopoly prompted, and was held to justify, regulation of rates. There is no monopoly in the preparation of foods. The prices charged by plaintiff in error are, it is conceded, fixed by competition throughout the country at large."

Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 67 L. ed. 1103, 1109, 1110.

We think it is clear, therefore, that the rules of the Food Administration so far as they attempt to fix the price of commodities classed as necessaries can derive no force either from the first or the fifth sections of the Act. Whatever validity it may have been thought they possessed was by virtue of the fourth section, the unconstitutionality of which has been finally established by the decisions in the Cohen Grocery Company and Weeds cases.

III.

THE REJECTED EVIDENCE

The Defendant attempted to prove by its Presi-

dent and also by another of its officers and by a local jobber specific sales of sugar made by them to the retail trade in and around Macon, Georgia, during the period following the rejection of the sugar by the Defendant and its resale by the Plaintiff. This evidence was excluded.

The suit involved 100 barrels of sugar, a barrel containing 350 pounds, or 35,000 pounds. The Plaintiff introduced market quotations from the standard trade journal (Willet & Gray's Sugar Bulletin) and proved by three uncontradicted witnesses that the prices quoted obtained in the Macon market during the period in question. The resales realized the full market price as shown by these quotations.

The testimony offered by the Defendant and excluded by the Court tended to establish at what prices certain local jobbers sold small lots to retail customers. It could not illustrate the market price of sugar in the wholesale trade, that is, refiners' prices to wholesale customers. Defendant endeavored to show that jobbers added a small percentage to the refiners' prices and that by deducting this percentage the refiners' price could be established. But its witnesses admitted that during the period in question the market was so demoralized that there was no standard, the witnesses stating that they sold sugar for what they could get regardless of what it cost them. There was, therefore, no basis of calculation. The testimony was without probative value and could only have tended to confuse the jury and furnish a false basis of calculation.

It has frequently been held that market reports in standard trade journals are recognized authority for the determination of market values.

> "Market reports in newspapers, such as the commercial world rely upon, are competent as evidence of state of markets. Such reports, which are based upon a general survey of the whole market, and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries, or individual sales or inquiries."
>
> **Sisson v. Cleveland, R. R. Co., 14 Mich. 489, 90 Amer. Dec. 252.**

> "Where prices of grain on the open market with specific dates are properly shown by authentic publications or trade bulletins accepted by grain dealers generally as standards, testimony of a grain dealer as to individual transactions or bargains on the board of trade is not admissible on the issue of market prices."
>
> **Fahey v. Updike Elevator Co. (Neb.) 166 N. W. 622.**
>
> **Gerhart v. Harris County, (Texas Civil Appeals) 244 S. W. 1103.**

The question was not whether the sugar brought its full market price but only whether the sale for the account of the Defendant was fairly conducted after proper notice to the Defendant and with an honest effort to get the best price obtainable. Plaintiff's witnesses detailed at considerable length the efforts which they made to dispose of the sugar. They described the chaotic condition which existed

in the sugar trade, the extreme difficulty in disposing of any large quantity for the reason that most dealers had considerable stocks of high priced sugar which they were endeavoring to sell on a rapidly declining market to save themselves from as much loss as possible, the fact that buying was altogether "hand to mouth." But in spite of these conditions the sugar was sold at the market price as shown by the recognized market quotations. It is submitted that the fact that the Defendant may have sold to certain retail customers a few hundred pounds at a slightly increased price did not show, or tend to show, that Plaintiff did not exercise due diligence and make reasonable efforts to obtain a fair price for the sugar sold.

> "If the vendee in a sale of goods refuses to take and pay for them, the vendor may sell the property, acting for this purpose as agent of the vendee, and recover the difference between the contract price and the price of resale. When the vendee is notified by the vendor of the intention to resell, and after such notice a sale is properly made, the vendee is conclusively bound by the resale and the amount realized under it."
>
> **Mendel v. Miller & Sons, 126 Ga. 834 (1);**
> **Green v. Ansley, 92 Ga. 647;**
> **Davis Sulphur Ore Co. v. Atlanta Guano Co., 109 Ga. 607, 609.**

IV.

THE CHARGE OF THE COURT

Only one exception to the charge is made. The Court instructed the jury that it was a question of

fact whether a sale between the 30th of November and the 20th of December was within a reasonable time. The Defendant contends that the jury should have been left to determine whether a sale made December 20th was within a reasonable time after Defendant's refusal to accept the sugar in September.

By the terms of the contracts the sugar was to be delivered during the month of September. Before the time arrived Defendant wrote Plaintiff requesting a postponement of the delivery. Plaintiff agreed to delay shipment until the latter part of the month. Through an error the sugar was shipped September 3rd. Defendant protesting that Plaintiff had agreed to delay, Plaintiff wrote that the invoice might be dated September 25th and as Defendant had seven days within which to pay, it would have until after October 1st, and would be in the same position as though the sugar had been shipped the latter part of September.

On the arrival of the shipment, Defendant refused to accept it but suggested to the Plaintiff that it be stored "for the account of whom it may concern." And it was so stored.

During the months of October and November Plaintiff made numerous efforts to induce Defendant to take the sugar and comply with its contract. Finally despairing, on November 30th it wired Defendant that it would sell the sugar for its account and hold the Defendant for any difference between the contract price and the price realized on resale. Plaintiff proved the chaotic conditions existing in the sugar trade during the Fall of 1920 and the ex-

treme difficulty in selling any large quantity of sugar, the market continually declining and the trade buying only in quantities sufficient to meet immediate demands and using every effort to dispose of accumulated stocks. The sugar was sold on December 20th and the jury found this was within a reasonable time.

The contract provided that delivery was complete on receipt of the goods by the carrier. When they were so delivered Plaintiff's obligation was at an end. Its contract had been fully complied with and it could have sued the Defendant for the full purchase price of the sugar. If Defendant refused to receive it when tendered by the carrier, Plaintiff was under no obligation to take charge of it in order to minimize the loss.

> "In a contract of sale where the seller has fulfilled his part of the contract and delivered the goods to the purchaser or his designated agent, this is all he can do; and if the purchaser refuses to accept the goods from this designated agent, the seller is entitled to recover, as his true measure of damages for non-fulfillment, the contract price of the goods, where there is a price agreed upon, or, where there is no agreed price, the market value of the goods where delivery is made. And in such case the seller may, if he choose, abandon the goods, and leave them in the hands of the carrier (the designated agent in this case being a carrier), and the rights of the vendor are not affected by the fact that the carrier subsequently sells the goods for freight and demurrage. This the carrier had the right

to do, and the purchaser should expect, as one of the results of the breach of his contract."

Castlen v. Marshburn, 8 Ga. App. 400 (3).

And to the same effect:

McCauley v. Sheldens, 30 Ga. 832.

But the Plaintiff was not obliged to abandon the sugar. It had a vendor's lien on it which it could exercise at any time until the Defendant accepted it. Such lien is expressly recognized in Georgia. The section of the Georgia Code so far as applicable is as follows:

"Liens in favor of creditors by judgment, decree, and mortgage, . . . and the lien of vendors shall remain as now regulated by law."

Park's Ann. Code §3330.

Georgia has not adopted the Uniform Sales Act, but in 1863 it undertook to codify all the laws of the State from whatever source derived. Many of the sections of its Code are statements of common law principles. Necessarily, however, the entire body of the common law could not be codified and, therefore, the Georgia Courts are constantly called on to apply common law principles other than those embodied in the Code. While the rights of a seller to retake property before it has actually passed into the physical possession of the purchaser and to sell it under the exercise of the vendor's lien is not so clearly stated as in the Sales Act, the lien exists and the rights of the seller are clearly shown from the following sections:

"Unless credit is specifically agreed on, or is the custom of the trade, the purchase money is

due immediately, and the seller may demand payment before delivering the goods."

Park's Ann. Code §4130.

"If the goods are delivered before the price is paid, the seller can not retake because of failure to pay; but, until actual receipt by the purchaser, the seller may at any time arrest them on the way and retain them until the price is paid. If credit has been agreed to be given, but the insolvency of the purchaser is made known to the seller, he may still exercise the right of stoppage in transitu."

Park's Ann. Code §4132.

"The right of stoppage in transitu exists whenever the vendor in a sale on credit seeks to resume the possession of goods while they are in the hands of a carrier or middleman, in their transit to the vendor or consignee, on his becoming insolvent. It continues until the vendee obtains actual possession of the goods."

Park's Ann. Code §2739.

Construing these sections, the Supreme Court of Georgia quotes with approval Parsons on Contracts to the effect that:

"It is well settled that goods are in transitu not only while in motion, and not only while in the actual possession of the carrier, but also while they are deposited in any place distinctly connected with the transmission or delivery of them, or rather, while in any place not actually or constructively the place of the consignee, or so in his possession or under his control that the putting them there implies the intention of delivery. And again on page 626 of the same volume, this author declares that they are in transit until they pass into the possession of the vendee.

"Our Civil Code, §2285 (new §2739), declares that the right continues until the vendee obtains the actual possession of the goods; and it is also declared in section 3552 (new §4132) of the same Code, that, if the goods are delivered before the price is paid, the seller can not retake because of failure to pay, but, until actual receipt by the purchaser, the seller may at any time arrest them on the way and retain them until the price is paid."

Branan v. A & W. P. R. R. Co., 108 Ga., 70, 73.

The seller delivered the sugar to the carrier but it had not been received by the buyer, who declined to take possession of it. Instead of leaving it in the possession of the carrier, the parties agreed to store it. So long as the buyer had not received it, the seller could take possession of it and sell it to satisfy its lien, and there is no limit as to the time when this can be done.

Said the Circuit Court of Appeals for the Fourth Circuit in considering a precisely analogous state of facts:

"Under a contract for sale of sugar, delivery to be made to carrier, where plaintiff made due delivery and the sugar was transported to the proper terminal warehouse in defendant's city, where it was held subject to defendant's order, but he refused to accept it, plaintiff held to have the right at its election to retake and sell the sugar, on due notice to defendant, **at any time thereafter,** and after crediting defendant with the proceeds to recover from him the remainder of the contract price."

Frederick v. American Sugar Refining Co. (C. C. A. 4th Cir.) 281 Fed. 305.

Abundant authority is cited to sustain the views of the Court.

Young v. Mertens, 27 Md. 114, 126,
Regester v. Regester, 104 Md. 1, 64 Atl. 286,
Rosenbaum v. Weeden, Johnson & Co., 18 Grat. (Va.) 785, 98 Am. Dec. 737,
Urbansky v. Kutinsky, 86 Conn. 22, 84 Atl. 317.

The Defendant relies on **Brooke v. Robson, 3 Ga. App. 136** and several other cases as establishing that a resale of rejected goods in order to bind the buyer must be made without unreasonable delay. In all the cases cited there was an anticipatory breach of the contract, no delivery having been made. Where there is such a breach section 4131, Park's Ann. Code is applicable. It is as follows:

> "If a purchaser refuses to take and pay for goods bought, the seller may retain them and recover the difference between the contract price and the market price at the time and place for delivery; or, he may sell the property, acting for this purpose as agent for the vendee, and recover the difference between the contract price and the price on resale; or, he may store or retain the property for the vendee and sue him for the entire price."

This section is codified from several decisions of the Supreme Court of Georgia. It is not a legislative enactment. The remedies provided by this sec-

tion are not exhaustive, nor do they exclude the pursuit of a different remedy by the seller where a purchaser refuses to take and pay for goods.

Carolina Portland Cement Co. v. Columbia Improvement Co., 3 Ga. App. 483 (1).
Fontaine v. Baxley, 90 Ga. 416.

The sugar having been delivered in accordance with the contract, there was no obligation on the Plaintiff to sell at all. When it elected to take charge of it, it was then obliged to sell within a reasonable time after doing so. This is what the Court charged. And the jury found the sale was within a reasonable time.

OTHER ASSIGNMENTS ABANDONED

There were other assignments of error, but the case is controlled by the questions already discussed. The Defendant in its brief makes no reference to the other assignments and we understand they are abandoned.

Home Benefit Association v. Sargent, 142 U. S. 691, 35 L. ed. 1160, 1164.

Respectfully submitted,

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any necessaries," and which has been adjudged violative of the due process clause of the Fifth Amendment as applied to criminal prosecutions, (*United States* v. *Cohen Grocery Co.* 255 U. S. 109,) is likewise invalid as a test of the validity of a contract for the sale of a commodity (e. g. sugar,) because in either case the standard of duty set up is so vague and indefinite as really to be no rule or standard at all. *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242, distinguished. P. 237.

4. Section 5 of the Lever Act did not invest the President with general authority to fix the profit which might be taken on sales of sugar, but only with special authority, on finding that a licensee was taking an unreasonable profit, to require that such practice on the part of the licensee be discontinued and to determine what was a reasonable profit to be taken in place of the one condemned. P. 242.
5. Section 6 of the Lever Act, though prohibiting wilful hoarding and also certain acts done for the purpose of unreasonably increasing or diminishing prices, did not prohibit a selling for delivery more than 30 days in the future. P. 243.
6. The duty of a seller upon retaking goods for sale on the buyer's account is to make the resale fairly in a reasonably diligent effort to obtain a good price. P. 244.
7. Evidence, on the part of the buyer, of particular sales of like goods by others at higher prices than that obtained by the seller's resale of the goods in question, *held* rightly excluded from the jury, both because the seller was not obliged to obtain the best price possible, and because the other sales, due to circumstances disclosed, did not tend to establish a standard by which the fairness of the resale could be judged. *Id.*
8. The duty of a seller to resell goods under a vendor's lien does not arise until he takes possession under it; and the reasonable time permitted for reselling does not begin to run until then. P. 246.

Affirmed.

ERROR to a judgment of the District Court recovered by the plaintiff in an action upon two contracts for the sale of sugar, which the defendant broke by refusing to accept the sugar when delivered.

Mr. Edgar Watkins, with whom *Mr. Frederick T. Saussy*, *Mr. Mac Asbill* and *Mr. Horace Russell* were on the brief, for plaintiff in error.

Mr. Orville A. Park, with whom *Mr. J. F. Abbott* and *Mr. Ralph Crews* were on the brief, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This was an action to recover for the breach of two contracts for the sale by a sugar refiner to a wholesale dealer of 35,000 pounds of refined sugar—the breach consisting in the buyer's refusal to accept the sugar when delivered. The plaintiff secured a verdict and judgment in the District Court; and the defendant prosecutes this direct writ of error, a constitutional question, among others, being involved.

The contracts were alleged to have arisen out of written orders from the wholesale dealer and written acceptances by the refiner. Whether the acceptances conformed to the orders, and so resulted in contracts, was questioned by a demurrer to the petition, and also at the trial, and is the first matter presented by the assignments of error. The defendant asserts that there was a material variance in three particulars. One is that the orders contained no designation of the place from which the sugar was to be shipped, while the acceptances named New Orleans as the place. This closely approaches a mere quibble. The orders were addressed to the refiner at New Orleans and expressly gave it an option to ship from any of its refineries, one of which was at New Orleans. So, in naming that place as the one from which shipment would be made, the acceptances were in accord with the orders. Another asserted difference is that the orders fixed one price for the sugar, while the acceptances fixed another price. This is equally without substance. In the acceptances the basis on which the price was calculated was described a little differently from what it was in the orders; but there was

no difference in meaning. Besides, the price calculated on the indicated basis was set out in the price column in the orders and in the acceptances, and was the same in both. Lastly it is said that the orders gave the refiner a conditional right to supply such grades of sugar as it might have available at the time of shipment, while the acceptances omitted the words of condition and made the right absolute. This point, although having more color than the other two, must fail for reasons which will be stated.

The orders and acceptances were both prepared by the refiner—a circumstance strongly suggesting they were intended to be in accord. After the acceptances were given, both parties in several ways affirmatively treated the orders as effectively accepted. Not until this action was brought was a variance suggested. In such circumstances a court should be solicitous to find, as the parties evidently did before they became hostile, an accord between the two instruments.

The orders were given in July, 1920, and called for shipment of the sugar during September of that year. They set forth carefully the assortment of packages and grades of sugar desired, with the particular price of each, and then said:

"Barrels or equivalent at price of 22½ cents, assortment to be furnished seller by buyer before September 1, 1920, but subject to such substitutions as seller may find necessary to make. In event assortment is not furnished prompt seller reserves right to ship such grades as it has available at the time of shipment."

The acceptances set forth the assortment of packages and grades, with prices, in the same way, and then said:

"Seller reserves right to ship such grades as it has available at the time of shipment."

This provision in the acceptances is well constructed and can have but one meaning. But not so of the provision quoted from the orders. In any view it is neither gram-

matical nor rightly punctuated. It was typewritten, and probably was prepared with the idea that the assortment of packages and grades would not be embodied in the orders, but would be furnished by the buyer later on. In fact, as just shown, the assortment was set forth in the orders. But, putting this aside, the context and the sense of the whole provision indicate that the clause, "in event assortment is not furnished prompt," was intended to be a part of and to qualify what precedes it rather than what follows. If that was the meaning intended, a mistake in punctuation by the typist should not be permitted to defeat it. *Ewing* v. *Burnet*, 11 Pet. 41, 54; *Hammock* v. *Farmers' Loan and Trust Company*, 105 U. S. 77, 84. The parties evidently treated it as the true meaning when the orders and acceptances were given, for their acts already recited have no other explanation. There is ample warrant therefore for regarding the full provision as reading:

"Barrels or equivalent at price of 22½ cents. Assortment to be furnished seller by buyer before September 1, 1920, but subject to such substitutions as seller may find necessary to make in event assortment is not furnished promptly. Seller reserves right to ship such grades as it has available at the time of shipment."

In this view the orders and acceptances contained the same reservation of a right to ship available grades. A like conclusion in a like situation was reached by the Circuit Court of Appeals for the Fifth Circuit in *American Sugar Refining Co.* v. *Newnan Grocery Co.*, 284 Fed. 835.

To avoid any misapprehension, it is well to state at this point that, in fact, the refiner delivered the assortment of packages and grades specified in the orders and repeated in the acceptances.

In its answer the defendant set up two defenses expressly based on the Lever Act of August 10, 1917, c. 53, 40 Stat. 276, as amended by the Act of October 22, 1919, c. 80, 41 Stat. 297, and on orders and regulations made there-

under. One defense was to the effect that the plaintiff was not entitled to "more than one cent per pound profit on what the sugar cost, which was the *prima facie* reasonable profit fixed by the President," and in no event was entitled to "more than a reasonable profit." The other defense was to the effect that the contracts were unlawful, because they provided for delivery at a future time, more than thirty days away, and thereby "tended to increase the price of sugar and to promote the hoarding thereof." Each of these defenses was challenged by a demurrer on the grounds, first, that the facts alleged were not sufficient to constitute a defense under the Lever Act, and, secondly, that that Act was in conflict with the Fifth Amendment to the Constitution and void. The demurrers were sustained on the second ground; and the defendant assigns error on that ruling.

As the Lever Act is a long one with various provisions, we assume that the District Court's ruling was confined to certain provisions in sections 4, 5, and 6, for they are all that could have any bearing. Section 25, mentioned in the briefs, related only to coal and coke. Section 1, likewise mentioned, provided for the issue of regulations and orders to carry out other sections, but did not alter or enlarge their prohibitions or requirements.

Section 4 provided it should be "unlawful for any person wilfully . . . to make any unjust or unreasonable . . . charge in . . . dealing in or with any necessaries," or to agree with another "to exact excessive prices for any necessaries." In a series of cases, of which *United States* v. *Cohen Grocery Company*, 255 U. S. 81, and *Weeds Inc.* v. *United States*, 255 U. S. 109, are examples, this Court held that provision invalid as contravening the due process of law clause of the Fifth Amendment, among others, because it required that the transactions named should conform to a rule or standard which was so vague and indefinite that no one could know what

it was. By copious references to judicial pronouncements and proceedings the court illustrated that the terms "unjust," "unreasonable" and "excessive" as applied to prices by that provision had no commonly recognized or accepted meaning. The ground of the decision is reflected by the following excerpt from the opinion in the first case (235 U. S. 89):

"Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes [by court and jury after the act] to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."

The defendant attempts to distinguish those cases because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle of those cases. They have been so construed and applied by other courts in civil proceedings. *Standard Chemicals, etc., Corporation* v. *Waugh Chemical Corporation*, 231 N. Y. 51, 54; *Dunman* v. *South Texas Lumber Co.*, 252 S. W. 274, 275. In the first of these citations, the

Court of Appeals of New York, referring to this Court's ruling in the *Cohen Grocery Company Case*, well said: "The ground on which it placed its judgment applies, and with like consequences, to civil suits as well. The prohibition was declared a nullity because too vague to be intelligible. No standard of duty had been established. . . . The variant views of judges of the District Courts were quoted as evidence of the absence of a standard. If this is the rationale of the decision, its consequences are not limited to criminal prosecutions. A prohibition so indefinite as to be unintelligible is not a prohibition by which conduct can be governed. It is not a rule at all; it is merely exhortation and entreaty."

In *Levy Leasing Company* v. *Siegel*, 258 U. S. 242, 250, a civil case arising out of the war-time rent law of the State of New York, this Court referred to the *Cohen Grocery Company Case* as "dealing with definitions of crime" and declared it "not applicable." This brief reference is now pressed on our attention, special emphasis being laid on the words "dealing with definitions of crime." We appreciate their import, but must recognize that they do not adequately reflect the matter dealt with. As already shown, it was broader than they indicate; and of course they were not intended to qualify or limit the decision. The important part of the reference was the declaration that the decision was not applicable to the case then under consideration. The inapplicability resulted from a material difference between the cases. One dealt with a federal statute prohibiting the sale of sugar at unjust, unreasonable and excessive prices, and the other with a state statute directed against reserving unjust, unreasonable and oppressive rent in the leasing of real property in a city for dwelling purposes.

The federal statute contained no provision pointing to what should be deemed a just, reasonable and not excessive price; and there was no accepted and fairly stable

commercial standard which could be regarded as impliedly taken up and adopted by the statute, as this Court construed it. While sugar has a market value, that value is subject to fluctuations which individual manufacturers and dealers can neither control nor readily foresee. The price in one trade center is affected by that in others, and in all there are material variations, even in short periods. The tendency to vary is illustrated in the present record, which shows that the price advanced in the early part of 1920, reaching 26 cents a pound in June, then remained steady for a month or two, and then declined irregularly to about eight cents.

The New York statute was not silent as to what should be deemed a just, reasonable and unoppressive reservation of rent. It recognized and named elements which would require consideration, and the state court construed it as prescribing a standard "which permitted the landlord to receive a reasonable income on his investment," valued as of the time when the rent was reserved. *Levy Leasing Company* v. *Siegel*, 194 App. Div. 482, 506; s. c. 230 N. Y. 634. So, when the case came here the question presented in this connection was whether that standard was sufficiently definite to satisfy the requirement of due process of law in the Fourteenth Amendment. This Court held that it was. Real property, particularly in a city, comes to have a recognized value, which is relatively stable and easily ascertained. It also comes to have a recognized rental value—the measure of compensation commonly asked and paid for its occupancy and use—the amount being fixed with due regard to what is just and reasonable between landlord and tenant in view of the value of the property and the outlay which the owner must make for taxes and other current charges. These are matters which in the course of business come to be fairly well settled and understood. A standard thus developed and accepted in actual practice, when made the

test of compliance with legislative commands or prohibitions, usually meets the requirement of due process of law in point of being sufficiently definite and intelligible.

The difference which we have pointed out between the two statutes and between the matters sought to be regulated by them made it obvious that the decision on the validity of one statute had no bearing on the question of the validity of the other.

As section 4 was invalid, whether taken as a civil regulation or as a criminal statute, it follows that in so far as the special defenses were based on it the demurrers were rightly sustained.

Section 5 was not dependent on section 4; nor did this Court consider its validity along with that of section 4. For present purposes, it may be described as (a) providing for the licensing of transactions in necessaries, including the manufacture, refining, distribution and sale of sugar; (b) as declaring that the President, on finding that any licensee was taking an unreasonable profit, might, by an order reciting his finding, require such licensee to discontinue taking the unreasonable profit, and might also determine what was a reasonable profit to be taken in lieu of the one found unreasonable; and (c) as providing that "in any proceedings brought in any court such order of the President shall be prima facie evidence."

It is apparent that the section did not invest the President with general authority to fix the profit which might be taken on sales of sugar, but only with special authority, on finding that a licensee was taking an unreasonable profit, to require that such practice on the part of the licensee be discontinued and to determine what was a reasonable profit to be taken in place of the one condemned.

The special defenses, while showing that the plaintiff was licensed to manufacture, refine and sell sugar, contained no allegation that the President had found that the

plaintiff in selling its sugar was taking an unreasonable profit, nor any allegation of an order by the President requiring it to discontinue such a practice. Of course, the special defenses could not derive any support from that section when there had been no action by the President under it.

One of the special defenses speaks of the President's having fixed one cent per pound as the profit which might be taken. But the reference is to an administrative regulation[1] which had no application to sales by a manufacturer or refiner to a wholesale dealer, such as are in question here. Besides, that regulation was revoked May 31, 1919, before these contracts were made. There was an administrative regulation[2] applicable to manufacturers and refiners which restricted them to taking not more than a fair and reasonable advance over cost; but this regulation was revoked January 26, 1919, before the contracts were made.

The allegation that the contracts called for a delivery more than thirty days in the future, and therefore were unlawful as tending to increase the price and promote hoarding, was of no legal effect. While section 6 prohibited wilful hoarding, and also certain acts done for the purpose of unreasonably increasing or diminishing the price, it did not prohibit a selling for delivery more than thirty days in the future. Nor did the special defenses set forth any facts which could be regarded as bringing the contracts within any prohibition of that section. Not improbably the pleader had in mind an administrative regulation[3] applicable to manufacturers and refiners which forbade making contracts of sale under which

[1] Food Administration Special License Regulations, No. XI, A–5.

[2] U. S. Food Administration Special License Regulations, No. VI, B–2 and C–2.

[3] U. S. Food Administration Special License Regulations, No. VI, A–2.

A. B. SMALL COMPANY *v.* AMERICAN SUGAR REFINING COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

No. 101. Argued October 22, 1924.—Decided March 2, 1925.

1. Written orders for goods, addressed to a sugar refiner, and written acceptances by the latter, compared and construed, in the light of the parties' conduct, and *held* free from variances alleged to prevent their forming completed contracts. P. 235.
2. In construing a typewritten document, a mistake of the typist by transferring the concluding clause of one sentence to the beginning of the next, thus altering the literal meaning, may be corrected to conform to the context and the sense of the whole and to the conduct of the parties. P. 236.
3. Section 4 of the Act of August 10, 1917, amended October 22, 1919, known as the Lever Act, which provides that it shall be "unlawful for any person wilfully . . . to make any unjust or unreasonable . . . charge in . . . dealing in or with any necessaries," or to agree with another "to exact excessive prices for

shipment was not to be made within thirty days. But no support can be derived from that regulation, for it was revoked January 26, 1919, prior to the making of these contracts.

In so far therefore as the special defenses were based on sections 5 and 6 and the regulations cited the demurrers were rightly sustained—and this regardless of any question respecting the validity of either of those sections or of any of the regulations.

A short statement of the case shown by the evidence, in so far as it is embodied in the record, will give a better understanding of the remaining questions.

By the contracts, made in July, 1920, the plaintiff agreed to deliver the sugar to a carrier at New Orleans during September, or soon thereafter, for shipment to the defendant at Macon, Georgia; and the defendant agreed to accept delivery to the carrier, to pay the contract price, and to bear the carrier's charges. In August the market price of sugar took a downward turn and continued to decline to the end of that year. In September the plaintiff made the delivery to the carrier as agreed; and in due course the sugar reached Macon. The defendant then refused to accept it and wrote to the plaintiff saying, "For the good of whom it may concern we suggest that this carload of sugar be stored to save any additional cost (demurrage, etc.) against whoever might be affected." The storage was effected as suggested with a Macon warehouseman, but was intended to be only temporary. Much correspondence ensued—the defendant repeating its refusal to take the sugar, and the plaintiff insisting the defendant was bound to take it and to bear the carrier's charges, etc. Finally, on November 30, the plaintiff sent to the defendant a notice saying, "As you have continued to refuse to take this shipment we must now inform you that unless you accept and pay for same at once we will resell this sugar for your account. When resale is made

we will require you to remit the difference between contract price and price received on resale, as well as for all freight, storage and other charges incurred." The defendant made no answer. The plaintiff then paid the several charges, took possession of the sugar and resold it in and around Macon—the last portion being sold December 20. There was an oversupply of sugar in the hands of wholesale dealers and others in that vicinity at the time, which made it difficult to effect a resale. But the plaintiff made an active and honest effort to make a fair sale and succeeded in obtaining the full market price prevailing in larger markets, plus the freight to Macon. The total amount realized, less storage and other charges not questioned, was $2,963.04. With this sum credited on the contract price there remained a balance of $5,111.70, which was demanded in the first count of the plaintiff's petition.

On the trial the defendant sought to prove by jobbers and dealers in Macon that the price of sugar at Macon was higher in October and November than in December, and that in December particular sales were made at a higher rate than the plaintiff obtained on the resale—the purpose in offering this testimony being to discredit the fairness of the resale by the plaintiff. A preliminary examination of the witnesses disclosed that the market at Macon was greatly demoralized during that period; that jobbers and dealers were selling for what they could get regardless of cost, lest they might lose more through a further decline; that the buying was in relatively small quantities and was on what was termed a "hand to mouth" plane; and that the particular sales in December were of such a character that they would shed no light on the fairness of the resale. On the plaintiff's objection, the court refused to permit the proffered testimony to go to the jury. Complaint is made of this ruling. In our opinion it constitutes no ground for a reversal. There were

obvious infirmities in what was proposed to be shown about the market price in October and November; but we need not dwell on them, because, as will be explained later on, the state of the market in those months came to be quite immaterial. What was proposed to be shown about particular sales in December was rightly excluded. The sales were of a kind that did not tend to establish a standard by which to judge the plaintiff's resale. Besides, the real question was not whether the plaintiff got the best possible price, or as much as others got in special instances, but whether the resale was fairly made in a reasonably diligent effort to obtain a good price. To have admitted the proffered testimony would have tended to confuse and mislead the jury.

At the trial the plaintiff took the position that when it delivered the sugar to the carrier at New Orleans its obligation under the contracts was fully performed and it became entitled to the contract price; that it could then have abandoned the sugar, but was not obliged to do so; that it had a vendor's lien thereon which could be availed of at any time before the sugar passed into the actual possession of the defendant; that it could realize on the lien by retaking the sugar and, after notice to the defendant, reselling the same for the latter's account and crediting the net proceeds on the contract price; and that it could recover the balance from the defendant. The District Court, in dealing with the first count of the petition, charged the jury to that effect—evidently believing it was conforming to Georgia statutes and decisions on the subject. No objection was made to that part of the charge nor was any exception taken to it; so we assume that it conformed to the local law and was applicable to the evidence. The court then proceeded to explain how that part of the charge should be applied, and in that connection said to the jury that if they believed from the evidence that the plaintiff retook possession under its vendor's lien,

they should next consider whether the resale was made within a reasonable time, and in doing so should take as the starting point November 30, when the plaintiff gave notice of its purpose to retake and resell, and should consider only the period between that date and December 20, when the resale was concluded. The defendant's counsel excepted to this, the terms of the exception being, "We except to the court fixing November 30 as the time from which a reasonable time should be figured. I construe the plaintiff as being always in possession." The defendant now insists the exception was well grounded. But we are of a different opinion. As the jury's verdict was for the plaintiff on the first count, they must have found that the plaintiff retook possession and made the resale under a vendor's lien. If it had such a lien under the law of Georgia—as we must assume in view of the unchallenged charge on that subject—the court plainly was right in saying the date when possession was taken under the lien was the starting point from which to reckon a reasonable time; and was also right in designating November 30 as that date. The suggestion in the exception that the plaintiff was "always in possession" had no support in the evidence set forth in the record, for it shows that the plaintiff surrendered possession to the carrier at New Orleans and was not again in possession until after the notice of November 30 was given declaring the plaintiff's purpose to take possession and sell. According to the Georgia statute, which the District Court applied, the plaintiff was entitled to take possession under its lien at any time before "actual receipt" of the sugar by the defendant. Parks Ann. Code, sec. 4132; *Branan* v. *Atlanta and West Point R. R. Co.*, 108 Ga. 70, 73. A duty to sell under the lien could not arise until possession was taken under it; and the reasonable time permitted for making a sale by way of realizing on the lien hardly would begin to run before.

What we have just said explains why the testimony offered respecting the state of the market at Macon in October and November, before the plaintiff took possession under the lien, became immaterial.

Judgment affirmed.